Selection of Leading Cases

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HINDU LAW

Supplementary Cases

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SELECTION OF LEADING CASES.

I.

HINDU LAW.

RAM GOPAL BHATTACHARJEE,

v.

NARAIN CHANDRA BANDOPADHYA.*

[*Reported in I.L.R. 33 Calc. 315; 3 C.L.J. 15; 10 C.W.N. 340.*]

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December, 6.

SECOND APPEAL by the defendant No. 1, Ram Gopal Bhattacharjee.

The plaintiff, Narain Chandra Bandopadhya, instituted this suit, out of which the second appeal arose, on the following allegations: That the defendant No. 1 on the 2nd January 1898 granted a *mourasi* and *mokurari* lease of the property in suit to his daughter Prabhabati, on whose death her husband Baidyanath as her sole heir became entitled to and remained in possession of the property. That on the 16th May 1901 Baidyanath let out the property to the plaintiff in *mourasi mokurari* right on receipt of a premium of Rs. 300 and put him in possession. The plaintiff alleged that he had been dispossessed by the defendant No. 1 and he accordingly instituted this suit for recovery of possession.

The defendant No. 1, who alone defended the suit, pleaded *inter alia* that the lease to Prabhabati was not a real transaction and that the property belonged to him; he also pleaded that, even if the lease was a genuine transaction, the property was Prabhabati's *stridhana* after marriage and that her mother was her heir and not Baidyanath.

The Munsif, who tried the suit, found the lease to be a real and *bona fide* transaction; he held that the property was Prabhabati's *stridhana* obtained after marriage to which the mother was

*PRESENT.—The Hon'ble Mr. Justice Pargiter and Mr. Justice Mookerjee.

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entitled to succeed before the husband. He accordingly held that the plaintiff had acquired no title under the lease granted by the husband and he dismissed the suit.

On appeal by the plaintiff, the Subordinate Judge affirmed the finding that the lease granted to Prabhabati was a real transaction. He found also that the lease had been granted to Prabhabati after her marriage; that she did not pay any fine; that the lease merely reserved a quit rent of one rupee a year; that Prabhabati died childless leaving her husband and that her mother was still alive. He held, however, that in respect of the property in suit the husband was the preferential heir and he accordingly decreed the suit.

The defendant No. 1 appealed to the High Court.

The following judgment was delivered:

BANERJI AND MOOKERJEE JJ. The facts which have given rise to the litigation out of which this appeal arises, so far as it is necessary to state them for the decision of the questions of law raised before us, are practically undisputed. The property which is the subject matter of this litigation originally belonged to the appellant. On the 2nd January 1893 he granted a mokarari and *istemrari* lease of this property, reserving an annual rent of one rupee, to his daughter Prabhabati. Prabhabati died in 1901 and on the 16th May 1901, the plaintiff took a sub-lease of the lands comprised in the tenancy from her husband, and on the basis of this sub-lease, the plaintiff seeks to recover possession. The appellant, who was the first defendant in the Court below, resisted the claim on the ground that as Prabhabati died childless leaving her mother as her heiress according to Hindu Law, her husband had no title to the property and could not confer any on the plaintiff. The Courts below have concurrently held that the interest created by the appellant in favour of his daughter constituted her *stridhan*, but while the Court of the first instance held that the mother was entitled to succeed in preference to the husband, the learned Subordinate Judge on appeal held that the husband was entitled to succeed in preference to the mother. The substantial questions of law, therefore, which arise in this appeal and which have been elaborately discussed at the Bar are first, whether the property in dispute was [illegible]

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in the Bengal School of Hindu Law, and, *secondly*, whether the husband or the mother is the preferential heir to it.

As regards the first question we do not entertain any doubt that the property in dispute has the characteristics of *stridhan* as defined in the Dayabhaga. It was indeed contended by the learned vakil for the respondent that a leasehold interest was unknown in the times when the authoritative text-books on Hindu Law were written, and that consequently the interest in property, which was created by the appellant in favour of his daughter, was not property to which the rules laid down in the text-books on Hindu Law could have any possible application. In our opinion there is no force in this contention. In the first place no authority has been cited in support of the proposition that leasehold interests were unknown at the time when the Dayabhaga was written. In the second place, we are not prepared to hold that the rules of Hindu Law are so inelastic as to be capable of application only to such descriptions of interests in property as formed the subject matter of transactions at the time when the rules were first formulated. Indeed if the rules of Hindu Law were so narrowly construed and applied it would be impossible to administer them, because in any case, the Courts would be called upon to hold a preliminary enquiry as to when a particular rule was first laid down and also as to what kinds of interest in property were recognized at that time. In the third place, if leasehold interest was not recognized as property, it is difficult to see how the plaintiff could have acquired any right on the basis of which his claim could be sustained. We must therefore hold that the property in suit is one to which the rules of Hindu Law are applicable. We are further of opinion that it possesses the characteristics of *stridhan*—according to the Dayabhaga in Chap. IV, sec. 1, paras. 18 and 19 of which it is laid down that, "that alone is her peculiar property which she has power to give, sell or use independently of her husband's control; Katyayana expresses this rather concisely. The wealth which is earned by mechanical arts or which is received through affection from any other (but the kindred) is always subject to his (husband's) dominion. The rest is pronounced to be the woman's property." No doubt this definition may be open to the objection that it defines one unknown quantity by means of

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that the reservation of a nominal rent altered the character of the transaction so far as the question now before us is concerned. There cannot be any reasonable doubt that the daughter received from the father a substantial interest in the property, although it was not the entire interest, which the father was competent to transfer. We hold accordingly upon the first question raised before us that the interest, in the property transferred to Pravabati under the deed of the 2nd January 1898, constituted her *agantuka stridhan* and falls within the class known as *anwadheya*.

As regards the *second* question raised before us, namely, whether the husband or the mother was the preferential heir to the property in suit upon the death of Pravabati, the answer must depend upon the interpretation of certain passages, in the Dayabhaga. But before we refer to these passages, it is desirable to point out that for the purposes of inheritance Jimutavahana divides *stridhan* property into two broad classes, namely, *agantuka* or property given to a female at a time other than that of marriage and *yautuka* or property given to a female at the time of marriage. The rules laid down for these two classes which are mutually exclusive are subject to modifications in the cases of (*a*) maiden's property and (*b*) *pitridatta* or property given by the father, for which special rules are laid down. It is clear from Chap. IV, secs. 2 and 3 that general rules are first laid down for *agantuka stridhan* and then follow special rules for *yautuka stridhan*. This is quite clear from the Dayabhaga, Chap. IV, sec. 2, paras. 1—6 which contain the general rules laid down by Jimutavahana relating to the devolution of the *stridhan* of a female, who leaves issue. Then follows special rules relating to *yautuka stridhan* in Chap. IV, sec. 2, paras. 13 and 16. If now we refer to sec. 3, which deals with succession to the *stridhan* property of a childless woman, we find it laid down in para. 23 that "the property goes first to the whole brothers; if there be none, to the mother; if she be dead, to the father; but on failure of these it devolves on the husband. Thus Katyayana says, that which has been given to her by her kindred goes on failure of kindred to her husband." This passage in our opinion contains the rule laid down by Jimutavahana regarding the order of succession to the *agantuka stridhan* of a childless woman. No doubt, the passage comes immediately after a discussion upon the

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question of the right of inheritance to the kind of *stridhan* called *sulka* or gratuity, but we cannot think that the passage can be restricted in its application to that kind of *stridhan* alone. In support of this view we may refer to the decision of this Court in the case of *Indian Natl Sircar* v. *Hemnat Coomar*, I. where Mr. Justice Dwarka Nath Mitter, after an elaborate examination of the different paragraphs of sec. 8, Chap. IV of the Dayabhaga, pointed out that the proposition laid down in para. 29 is nothing but the final result of the various matters discussed in the preceding paragraphs commencing from paragraph 10, which makes the brother a preferential heir to the husband in respect of wealth received by a woman after her marriage from the family of the father of her mother or of her husband; indeed the applicability of para. 29 to all the three kinds of *stridhan* mentioned in the text of Yagnavalka cited in para. 10 is beyond all dispute. We entirely agree with the line of reasoning adopted by that learned Judge with regard to the scope of the rule laid down in para. 29 and we are fortified in this view by the opinion of three of the commentators on the Dayabhaga, namely, Srinath, Rambhadra and Srikrishna, who expressly state that the rule enunciated in para. 29 is a summary of the preceding discussion. [See the Edition of the Dayabhaga with six commentaries published by Promatho Coomar Tagore in 1863, pp. 173, 174.] We may further point out that the conclusion at which Jimutavahana arrived is clearly supported by the text of Manu (Chap. IX, 196-197) cited in the Dayabhaga, Chap. IV, sec. 2, para. 27, by the text of Yagnavalka (Chap. II, 143-145) referred to by implication in the same passage, by the text of Katyayana quoted in the Dayabhaga, Chap. IV, sec. 3, para. 32, and by the text of Brihaspati set out in the Dayabhaga, Chap. IV, sec. 3, para. 7. These texts lay down that in certain specified cases, the husband or the parents succeed first, and the inference is irresistible that in other cases, by the general rule, the brother succeeds first. It is argued, however, by the learned vakil for the respondent that the rule by which the husband is postponed to the brother, mother and father in the case of succession to the specific *stridhan* of childless females applies only to the property of a female married in one of the

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inferior or disapproved forms, and in support of this proposition reliance is placed upon Srikrishna's Dayakrama Sangraha, Chap. II, sec. 4, para. 11, which provides as follows :—

"Failing either of these (that is barren and widowed daughters), the other succeeds, and, in defaults of successors including the barren and widowed daughters, the succession devolves in due order, by the rule of analogy, as in the case of wealth received at nuptials, namely, on the woman's husband, brother, mother and father, if she were married according to any one of the five forms denominated Brahma and the rest; or if she were married according to any of the three forms styled Asura, &c., on her mother, father, brother and husband."

Reference is also made to the summary given by Srikrishna at the end of his commentary Chap. IV, sec. 3 of the Dayabhaga, where the same view is enunciated. This opinion of Srikrishna, however, though apparently founded upon the first interpretation of the text of Manu quoted in the Dayabhaga, Chap. IV, sec. 2, para. 16, is directly contrary to that of Jimutavahana as expounded in Chap. IV, section 3, paras. 12 and 13 of the Dayabhaga, which is to this effect—

"12. That is confirmed by Vridha Katyayana, who says immovable property which has been given by parents to their daughter, goes *always* to her brother, if she dies without issue. For it appears that the brother's right of succession is founded simply on her leaving no issue (which is the case equally of a maiden, as of a childless wife).

"13. The remark of Viswaroopa that property of a childless woman married by any form of nuptials from that of Brahma to that of the Pisachas (as hinted by the term *always*) goes to her brother, should, therefore, be respected."

In other words, the text of Devala, namely, that "a woman's property is common to her sons and unmarried daughters, when she is dead; but if she leave no issue, her husband shall take it, her mother, her brother, or her father," which is quoted by Jimutavahana in the Dayabhaga, Chap. IV, sec. 2, para. 6, is regarded by him as enumerating the heirs, and not as indicating the order in which they are entitled to succeed. The question, therefore, ultimately resolves into this, whose opinion is to

After her, a married daughter who has [illegible] who is likely to have male issue, inherit together.

"4. Next the succession devolves on the barren and widowed daughters, and, in default of all daughters the mother and the next ancestor, as in the case of [illegible]. For a text of Manu declares, the wealth of a woman which has been in any manner given to her by her father, let the husband take or let it belong to her offspring.

"5. Hence the property given by the father, it is intended, that whatever has been given by her father even at any other time than that of the wedding, belongs first to the damsel, and after her it goes to her offspring, herewith."

The first paragraph of this passage refers essentially to *pratidatta* as due to *anvadheya*. The second and third paragraphs may at first sight be supposed to have an equally extensive application but in our opinion, the words as to the case of property received on [illegible] clearly indicate that the list of heirs given by the author in paras 2 and 3 is applicable only to *pitridatta stridhana*. This view is considerably strengthened by a reference to the summary given by Srikrishna in the concluding portion of his commentary on Chap IX, sec 1 of the Dayabhaga. He states there in unmistakable terms that as regards *pitridatta stridhana* that is property given by the father at any other time but the wedding, a married daughter succeeds in the first instance next after a son, then a daughter who has, and one who is likely to have male issue, after them the daughter's son, the son's son, the great grandson in the male line, the son of a contemporaneous wife, and his grandson and great grandson in the male line, next to these the barren, and widowed daughters inherit together. If, moreover, paragraphs 2 and 3 of Srikrishna's Dayakrama Sangraha, Chap II, sec 5, be interpreted as applicable to *anvadheya* as well as [illegible], the conclusion is irresistible that his view as set forth in his treatise is absolutely irreconcilable with his view as enunciated in the commentary on the Dayabhaga. On the other hand according to the interpretation put by us on paragraphs 2 and 3 of the Dayakrama Sangraha, Chap II, sec 5, in which he has laid down therein is restricted in its application to *pitridatta stridhana*, the views enunciated in the two [illegible]

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Lal v. Ram Chandra Pramanik. The first of these cases was originally heard by Norman C. J. and Loch J., and the learned Judges had adopted the construction put by Srikrishna on the original texts, that according to the Bengal School of Hindu Law, the husband is entitled in preference to the property, which a woman receives from her father before or after her marriage, in preference to her brother or mother. Upon an application for review this judgment was subsequently set aside and the case was re-argued before Mr. Justice Jackson and Mr. Justice Dwarka Nath Mitter.[1] Mr. Justice Mitter, with the concurrence of Mr. Justice Jackson, held upon an elaborate examination of the authorities, that according to the Hindu Law as current in Bengal, the mother succeeds to the property of her daughter bequeathed to her by her father before her marriage in preference to her husband, and that such property falls within the category of *stridhan*. Although the process of reasoning by which that learned Judge arrived at this conclusion may be partially open to criticism, and although we are unable to adopt the construction placed by him upon the passage of the Dayabhaga, quoted from Chap. II, sec. 1, we entertain no doubt that the rule laid down by him is correct. The decision was followed in *Hurry Mohun Shaha v. Surjo Sahai*[2] where it was held upon a construction of Chap. IV, sec. 1, para. 10 of the Dayabhaga, that where property given to a woman after her marriage by her husband's father's sister's son, the brother, mother and father are under the Bengal School of Hindu Law preferable heirs to the husband, and in the recent case of *Lal Chandra Pal v. Ram Kanai Pal*[3], the principle which underlies the decision in *Lalla Nath Sahai v. Hem Chunder Sen*[4] was accepted as well founded, and it was ruled that the brother is the preferential heir to the husband of a female property obtained from her father after her marriage by a woman, who has died childless.

Reference was made at the bar, in the course of the argument, to two modern text-books in support of the view taken by the learned Subordinate Judges in the Court below, namely, to Mayne's

[1] (1904) I. L. R. 32 Calc. 311
[2] (1871) 16 W. R. 108.
(1872) 19 W. R. 264; 11 B. L. R. 396
[3] (1879) I. L. R. 4 Cal. 275

[illegible] See [illegible] [illegible] power of [illegible] given [illegible] Hindu [illegible] existing at the [illegible] death is valid [illegible] 30 [illegible] 740 [illegible]

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The [illegible] property [illegible] her father, [illegible] brother [illegible] father and [illegible] husband [illegible] of [illegible] preferred to husband [illegible] and [illegible] brother of the husband [illegible] step brother of the deceased. [illegible] daughters [illegible]

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first defendant resists the claim on the plea that Dayamoyee Dasee was a prostitute and that consequently, Hara Chand Jalal, though her brother's son was not her heir under the Hindu Law. The contention has been accepted by both the Courts below. The evidence shows that Dayamoyee Dasee was a married woman that after the death of her husband she became a prostitute and that she was the mistress of one Rup Chand. The house was apparently purchased by her own earnings and throughout the litigation, it has been asserted that it was her *stridhan* property. The assumption is in accord with the accepted view of the Bengal School of Hindu Law, namely, that the term *yautaka* has a technical meaning, in the words of Jimutavahana, "that thing of which she has power to give away at her own will, unless hostile of her husband's control" (Dayabhaga Chapter IV, Section I, paragraph 15; *Bejoy Indur Mukerjee Nagar v. Kissen Sunder Ass*). The substantial question of law which, consequently, has been raised in this appeal may be formulated in these terms:

"Does the *stridhan* property of a Hindu woman who has adopted the life of a prostitute pass upon death to her brother's son as an heir under the Bengal School of Hindu Law?"

It cannot be disputed that if a Hindu woman, governed by the Bengal School, is unchaste her *stridhan* property passes upon her death to her brother's son in the absence of nearer heirs. This position is established in Jimutavahana in the Dayabhaga (Chapter IV, Sect. III, paragraph 47). Having pointed out in paragraph 46 and 47 that the text of Vishnu mentioned in paragraph 45 is not merely a statement of succession, and is not declaratory of the order of inheritance, he observes that the text is "an exposition of the strength of the fact (of the benefits conferred)" and then proceeds to declare the order of succession in paragraph 47 in the following terms:

"Thus then the order of succession according to the several degrees of benefit to the owner of the property is to the effect of funeral oblation at large." In the first place, the brother's younger brother is entitled to the woman's property, as he is a *sapinda*, and presents oblations to her in her husband's

grandfather and to herself. It is clear that the capacity to present oblations to the father and the grandfather of the agent is not dependent upon her character, the claimant offers such oblations because they are the father and the grandfather of his own father. In so far, therefore, as capacity to present oblations to the father and the grandfather of the woman is concerned the claimant possesses that qualification, whether or not his suit is repudiable. But in so far as capacity to present oblations to herself is concerned it may be argued that when she lapses into prostitution the claimant loses that capacity. This, in fact, is the line of argument adopted by the appellant as based upon general principles of Hindu jurisprudence. The contention in essence is that when a Hindu woman lapses into prostitution, she is civilly dead, and that in the eye of the law the tie which connected her to any person through her father, mother, husband or children is completely severed. In other words, so far as her relations are concerned, the position is precisely the same as if she had suffered physical death. To establish this position, the appellant has been constrained to argue that when a woman lapses into prostitution she becomes an outcast, and that when a person has become an outcast whether a man or a woman the kinsmen must perform the same ceremonies as at the time of death.

Reference has been made to the following passages from the laws of Manu:

"The *sapindas* and *samanodakas* of an outcast must offer a libation of water to him, *as if he were dead*, outside the village on an unsuspicious day to the evening and in the presence of the relatives, officiating priests and teachers." XI, 183.

"A female slave shall upset with her foot a pot filled with water, *as if she were from dead passion*. Her *sapindas* as well as the *samanodakas* shall be unpure for a day and a night." (XI, 181).

"But thenceforward, it shall be forbidden to converse with him, to sit with him, to give him a share of the inheritance and to hold with him such intercourse as is usual among men." (XI, 183).

Page [illegible] Volume 25, page 468

[illegible] –10, S B K, Volume 14 page 77; [illegible] Volume 14, page 216; and [illegible]

[illegible] water" (XI, 157).

[illegible] (XI, 188)

[illegible] Manu, which refers specially to female ascetics.

"[illegible] but clothes, food and drink shall [illegible] shall have alms to the family [illegible] Do, page 489

[illegible] proceed further in the [illegible] page 1439 and page 197, A

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To the same effect is the following passage from the Institutes of Yajnavalkya:

"This very ceremony is ordained in the case of degraded woman. They should be given dwelling room in the vicinity of the house, provided with food and clothing, and be guarded" (III, 297, Mandlik page 279).

Vijnaneswara comments upon this passage that the fallen woman should be allowed food just sufficient to sustain life and a piece of coarse cloth; he adds that she should be reproved and admonished not to have intercourse with another man (Mitakshara 6d by Setlur, page 1082). To the same effect is the comment of Apararka (Poona edition page 1408).

It is fairly clear from the passages already quoted that the performance of ceremonies similar to obsequial ceremonies, by the kindred of a person who is guilty of a heinous sin and who thereby becomes an outcast, is indicative not of the fact that he is utterly dead but rather of the fact that his social rights have been suspended and such rights may be revived by the performance of the appropriate ceremonies and penances. This is supported by the express statement of Apararka in his Commentary on Yajnavalkya (III, 261, Poona Edition, page 1126), that the outcast is, from the time of the performance of the ceremonies described, to be excluded from all social and religious performances and no one is to have intercourse with him in ordinary life. Apararka supports this view by quotations from the Institutes of Gautama, Vasishtha Sankha and Likhita. This is further confirmed by the fact that the social rights of the outcast may be revived upon the performance of the prescribed penances and ceremonies. This is elaborated in the Prayaschitta Viveka of Shripati, in which a long series of sins is dealt with and divided into nine classes. For each of these classes penances, ceremonies and gifts are prescribed, and these vary in respect of differences even in the same class, according to their gravity. A convenient summary of the different classes of sins and the respective penances and ceremonies will be found in the Sahitakalpadruma Art *Prayaschitta*, Volume I, pages 24, 34. The view that an outcast is not entirely dead is further supported by the fact that the kindred of an outcast have to perform his obsequial

[illegible] or who has committed the heinous

[illegible] to the statement in the Institutes of [illegible] (XXIX. 5. 9, E, Volume 7, page 91). "On the death [illegible] a female slave of his must upset a pot with water [illegible]

[illegible] purports of a heinous sin," namely, first, it causes [illegible] secondly, to go to hell, and secondly, its capacity to [illegible] from sexual intercourse. The former effect [illegible]

[illegible] sexual intercourse. Such [illegible] of a heinous sin [illegible] would be [illegible] to [illegible] a passage of [illegible] [illegible] [illegible] mouth of it [illegible]

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the estates of both when deceased, and adds that it means "not mere demise, but also the state of a person degraded, gone into retirement, or the like." This passage, however, is clearly of no assistance to the appellant, because it merely asserts that right of property is annulled by degradation. That this is the true import of the passage is clear from the Dayatattwa of Raghunandan (Chapter I, paragraphs 9—11) where he points out with reference to the text of Narada quoted by Jimutavahana in the Dayabhaga (I, 5) and explained in I, 56), that sons are entitled to protection if the right of property of the parent be annulled by death or by degradation. This obviously refers to an entirely different problem. We are not now concerned with the question whether a person who has committed a heinous sin and has become an outcast can not only be excluded from inheritance (Dayabhaga, Chapter V, paragraphs 6—13) but may also lose all rights of property, or whether such a comprehensive proposition can be reconciled with the view accepted by their Lordships of the Judicial Committee in the case of *Narayan Ambaji v. Ambaji*[1], nor need we determine whether the decision in *Shivanath Roy v. Hurrosundari Dayamayee*[2] upon which much stress was laid by the appellant, can be treated as well founded on principle in so far as it ruled that an adopted son forfeits his rights in the estate of his adoptive father by reason of intercourse with a Mahomedan woman subjecting him to the penalty of irrevocable exclusion from caste. The position now under consideration is of an entirely different character. We are called upon to determine whether, where a woman lapses into prostitution, the tie of her relationship with her kindred is severed so as to render it impossible for the kindred to claim her estate by inheritance. As already stated the texts do not support the theory that the tie is so severed. Nor is it, there is the opinion of Mr. J. C. C. Sutherland, in his Synopsis of the Hindu law of Adoption appended to his Translation of the Dattaka Mimansa and Dattaka Chandrika, to the effect that the mother of an infant may give away a child in adoption during the lifetime of her husband who has remained with, emigrated, entered a religious order or become an outcast,

(1892) I. L. R. 3 Calc. 776; L. R. 7 I. A. 115.

[2] (1868) 10 W. R. 17.

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with a fallen woman or otherwise would they be ready to claim property which represented the wages of her sin. It is remarkable that this feeling led Chanakya to lay down in his Arthasastra that the estate of women of this class taken by the King by escheat or the absence of heirs should be given away by him to charity (Arthasastra of Kautilya, Mysore edition page 161). But Chanakya undoubtedly contemplated that the estate would not reach the hands of the King till there was a complete failure of heirs. The same idea pervades a passage in the Nirnayasindhu (Bombay edition page 317) where it is stated that the wealth of a fallen woman may be taken to gift by a Brahman for religious purposes if it does not reach his hands directly. But the position is entirely different when the kinsfolk of a woman who has lapsed into prostitution lay claim to her estate upon her death. The mere fact of the degraded life she led did not sever the tie of relationship between her and her kinsfolk and though she might have been disinherited as an heiress there is no reason why her collegeal relations should not, if they are prepared to put forward the claim, have her *sridhan* estate by right of inheritance.

It has been earnestly contended however on behalf of the appellant that this view is largely opposed to what has been regarded as settled law in the Courts of this Province since 1813, and should on that ground alone be repudiated. We are clearly of opinion that this contention ought not to prevail. It is true that in the case of *Bose Hossee Bose* v. *Hotee Bunsooree*[1] it was held that the tie of relationship severed between a married and respectable daughter and her mother when the latter adopts the life of a prostitute. This decision was founded upon an opinion of the Pandit of the Sudder Court which is supported neither by any statement of reasons nor by any reference to the original texts. On the other hand, in the Matsya Purana, as quoted in the Saluddhatattwa, Volume III, page 24, it is expressly stated that there may be fallen persons who cannot be forsaken and, as an illustration, it is said that although elder relations who may have lapsed into prostitution or have otherwise fallen should be abandoned yet the mother should never be

[1] (1865) 7 Mor. Sel. Rep. 325 at p. 327 (2 S.)

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v *Hyla Ashdan*[1] and *Nanan Bee* v *Tirrut Tewar*[2] In some of the cases, again, a question of competition between a degraded and an undegraded person has arisen for consideration, and that, in fact, was the real question before the Sudder Court in *Ram Ranee Dassee* v *Hur Ranee*[3] so also was the question directly in issue in *Narain* v *Bhoot*[4] and *Narain* v *Sarjoo*[5] That question of preferential right does not require consideration in the case before us and we need not consequently determine whether as stated in *Sootrugun Pillai* v. *Ramasami Pillai* the claim of the degraded heir may be preferred to that of the undegraded heir of equal degree on any 'equitable principle'

The extent to which divergence of judicial opinion is possible in cases of this description is well indicated by the decision in *Rampersad* v *Mt Sona Koer* In that case, one Radha was legally married to one Mati Lal, but many years before her death she abandoned her husband and led the life of a prostitute and lived as the mistress of Ratchunge Upon her death, her property, which had been received by her from her paramour, was claimed, on the one hand, by the daughter of her sister, and on the other by a son of the brother of her husband The claimants were both of them undegraded but the defendant the son of the husband's brother resisted the claim of the plaintiff, the sister's daughter, on the ground that as a respectable woman she was not entitled to succeed by inheritance to the estate of her mother's sister who had become degraded by reason of lifelong prostitution. The Judicial Commissioner declined to accept the contention that when a woman has entered into prostitution she becomes civilly dead, with the result that the tie of relationship which connects her to her kindred is completely severed He held that a tie of blood can be destroyed by no statute, whatever personal disabilities may be imposed by express provisions of the law upon the person who has become outcast consequently, where the statute to a right arising out of succession the uncleanness or degradation of the *propositus* or *propositae* as the case may be, will not divert the descent of

[1] (1870) 2 Ath N C R 300
[2] (1880) I L R 2 All 6
[3] (1810) 2 Mad Sel Rep 324; 2 I D (O S) 387
[4] (1880) I L R 12 Mad 277
[5] (1888) I L R 11 Mad 133
[6] (1902) I L R 25 Mad 371
[7] (1908) 4 Nag L R 31.

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the technical sense of a wife's or a married woman's property and that property so acquired goes to her illegitimate child and not to the members of her husband's family, upon whom the widow had no claims whatever after she began to live with her paramour. It is not necessary for our present purpose, to examine the question, by no means free from difficulty, as to the true nature of Hindu marriage and the still more difficult question, whether the marriage tie is dissolved and the relationship of husband and wife annulled by the lapse of the wife into prostitution. Nor is it necessary to examine the further question whether, assuming the marriage tie to be capable of dissolution even by the custom of prostitution on the part of the wife, the sister's daughter or husband's brother's son would be the preferential heir to property acquired by her as a prostitute. The learned Judicial Commissioner held that no Hindu lawgiver, with his high ideals of female chastity and of spiritual affinity between husband and *pativrata*, would place the husband in the list of heirs to the acquisitions of his fallen wife by and during her degradation. In this view the Judicial Commissioner held that the plaintiff, who was governed by the Bombay School of Hindu Law, was entitled to what was described in *Harilal Kevaldas v. Ba Kesar*[1] as "the next" of her mother's sister, on the ground that the defendant as the son of her husband's brother was either no heir at all or if an heir was found to be postponed to the plaintiff.

I post on examination of the original texts and upon a review of the judicial decisions on the subject we hold that the mere fact that a Hindu woman has adopted the life of a prostitute does not sever the ties which connect her to her kindred by blood, and that consequently the *stridhan* property of a Hindu woman who has adopted the life of a prostitute passes upon her death, in the absence of nearer heirs to her, to the person as an heir under the Bengal School of Hindu Law.

It is conceded that, as held by the Division Bench, the plaintiff cannot successfully claim the arrears of rent purchased by him. The decree of the Court below must consequently be modified to this extent.

[1] (1902) I. L. R., 7 Bom. 79.

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In this view, the decree of the Subordinate Judge must be affirmed, subject to the variation mentioned. The respondent will have his costs of the hearing as well before the Division Bench as before the Full Bench.

Note.—Prostitution does not sever the legal relation and therefore the degradation of a woman [illegible] of her own caste does not [illegible] a cessation of the tie of kindred between [illegible] and the members of her natural family or between her and the members of her husband's family. Succession to her property [illegible] by the Hindu Law [illegible] [illegible] [illegible] Mad. [illegible] [illegible] [illegible] degradation [illegible] the marriage [illegible] inheriting her own property on the ground of unchastity [illegible] which she would otherwise [illegible] [illegible] Mad. [illegible] A [illegible] [illegible] the property of [illegible] [illegible] [illegible] [illegible] The [illegible] inheritance [illegible] [illegible] from inheriting her mother's property [illegible] [illegible] [illegible] Mad. [illegible] The step [illegible] of a degraded woman [illegible] the property [illegible] of her late husband [illegible] [illegible] 28 Mad. 171 [illegible] [illegible] [illegible] [illegible] by a Hindu woman [illegible] the property rights [illegible] [illegible] 70 (74); I. L. R. 31 Mad. 101.

[illegible] [illegible] ; *Ganga v. Ghasita*, I. L. R. 1 All. 46 ; *Nagendra v. Raja* [illegible] [illegible] daughter not [illegible] [illegible] Hindu Law [illegible] does not [illegible] property [illegible] her degradation [illegible] The [illegible] property [illegible] Hindu [illegible] [illegible] purposes of [illegible] A legitimate [illegible] [illegible] property [illegible] father and the [illegible] daughter [illegible] possession [illegible] such property. The [illegible] of degradation [illegible] heritable right [illegible] her [illegible] [illegible] Mad. [illegible]

The case [illegible] woman who [illegible] married [illegible] [illegible] [illegible] such a case [illegible] Court may [illegible] [illegible]

Degradation of the husband [illegible] does not dissolve the marriage [illegible] ; *Bimcheo v. Mato Chelam*, 2 All. H. C. R. 300.

An adoption does not sever the tie of blood with the natural family for all purposes. An adopted son has to observe [illegible] for the loss of his natural parents. He has to observe restrictions as to marriage with the girl from his natural family.

Before Jenkins C J Harington Stephen and Holmwood JJ

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This reference arose out of a suit for possession on establishment of title to certain lands. The appeal in the High Court was by the plaintiff.

The facts of the case, as stated in the referring order of Stephen J, are as follows:—

[illegible]

It was not disputed [illegible] question that had been argued was whether [illegible] unfortunate mortgage executed by the widow in favour of [illegible] on the 23rd Bhadra, 1303, to secure a loan of Rs. [illegible] by the defendant that this mortgage was valid [illegible] it was made for legal necessity and because [illegible] sum of Rs. [illegible] Rs. [illegible] and because [illegible] and he passed the sale.

The judgments of the Court are as follows:—

JENKINS C J. The question submitted for the determination of this Full Bench is in these terms:

"Is the alienation, by way of mortgage by a Hindu widow of a portion of the estate of her husband which [illegible] legal necessity, but with the consent of the next reversioner for the time being, valid and binding on the actual reversioner who is not the heir of the consenting reversioner?"

The husband in this case died without male issue and the widow became, and at the date of the alienation still was, his heir.

* Reference to a Full Bench on appeal from Original D [illegible] N [illegible] 1913.

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A widow's power of alienation for purely worldly purposes over her sonless husband's estate has been a constant theme of discussion, and in some respects it has been placed beyond the possibility of further argument.

Thus it may be taken as settled beyond dispute that she can alienate for legal necessity either the whole or a part of her deceased husband's estate; and that even in the absence of such necessity the alienee's title will prevail if he made reasonable enquiry and acted in the honest belief that such necessity existed. But the problem how far apart from this she can alienate merely with the consent of her husband's kindred is beset with difficulty.

A multitude of authorities bearing on this point has been cited to us and foreign. I have considered them all. I propose to refer only to a few in expressing my opinion on the question submitted for our determination.

In 1876 a Hindu widow's position was considered by the Privy Council, and Lord Cairns in delivering their Lordships' opinion said of her: "She is entitled to the possession of the property, but that she is entitled to enjoy it according to the rights of a Hindu widow which it appears to us to be also fairly impossible to define. I mean the extent and limit of her power of disposing of it must depend upon the circumstances of that disposition, whatever such disposition shall be made and it must be considered with the law regulating such dispositions." *Sonatun Bysack v. Juggutsoondree Dossee*.[1]

In the *Executors of Muttyloll v. Luckey Monee*[2] decided in 1868 it was said at page 551 of a Hindu widow that "for purposes of charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity. On the other hand, it may be taken as established that an alienation by her which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred. The exemption

[1] (1876) 3 I.A. 54 at p. 77; 1 I.D. 148 at p. 161.
[2] 1868 8 Moo. I.A. 39; 2 W.R. (P.C.) 11.

in favour of a transaction with coheirs may be due to a presumption of law that where that consent is given the purpose for which the alienation is made must be proper."

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The case of *Lord Irwin v. Warren* came before the Privy Council on appeal from the High Court at Fort William in Bengal. The transaction in controversy was a sale by a widow, the deed of conveyance being executed by her and attested by one Jaggut Ram. The High Court held that the consent of Jaggut Ram so attested, given at the time of the sale and against his own obvious interest, was a very strong piece of evidence in favour of the purchaser, as Jaggut Ram was from the sale near and connected, and at the date of the sale was the person most likely to know the real state of the case and the correct pretensions of the widow. In delivering the opinion of the Privy Council Sir James Colvile, dealing with this question of consent, said: "Their Lordships do not mean to impugn those authorities which have shown that a transaction of this kind may become void on the consent of the husband's kindred; but the kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events there should be such a concurrence of the members of the family, as suffices to raise a presumption that the transaction was a fair one, and one justified by Hindu law. That it can be, as Mr Field seemed to put it, a presumption of law in the sense of *presumptio juris et de jure* [conclusive] cannot be contended. It is no doubt, an element to be taken into consideration, and deserving of considerable weight in the estimation of the evidence of the transaction."

Their Lordships after expressing their entire concurrence in that judgment and dismissing the appeal with costs, stated that he was not proved to have been the next reversioner, they proceed as follows: "On the other hand the mere fact of connection with the family leads to the presumption that he knew that the present appellant had the power [illegible] by the husband to adopt a son and that, besides his interest as next reversioner, a powerful motive existed, as next reversioner, to prevent the adoption from being defeated. Therefore, if [illegible]

(1914) 19 Ind. Cas. 268 = 18 C. L. J. 26 = 41 Cal. 1

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not amount to such a concurrence by the husband's kindred as, in the opinion of their Lordships, would have defeated the plaintiff's claim. [illegible] after pointing out that no proof as to concurrence had been moved on the pleadings or in earlier stages of the cause they say: "The case of the party who sought to support the validity of the transaction was that the sale had been made for particular purposes. He gave no evidence of that. He had not, by any suggestion in his written statement or otherwise, put forward the circumstance of Bhagat Ram, either as supplying the want of proof of the existence of the debts and the necessity of the sale, or as a reason for dispensing with such proof."

In *Mewa Singh v. Lala Hira Ram*[1] Lord Haldane, delivering their Lordships' opinion, says: "To give validity to the [illegible] the plaintiffs must show that there was legal necessity for raising the money by a charge on Kharati's estate or at least that on advancing [illegible] the creditors gave credit on reasonable grounds to representations that the money was wanted for such necessity. It is not a case in which all the kindred of Kharati have assented or could assent in the hands or either of them are the circumstances such as, in the opinion of their Lordships, to raise any presumption from such concurrence as there was of Achhra Kuar and Inder Singh to bind Jawahir Singh and Inder Singh in the second bond that the borrowing was for a purpose sanctioned by Hindu law. In order to raise such a presumption the consent of the deceased's kindred to his widow's or daughter's alienation must be shown to be given with a knowledge of the effect of what they were doing, and in an intelligent intention to consent to such effect."

The law as enunciated by their Lordships in these cases is clear. It will be seen that in a decision of a Full Bench of this Court in *Nand Singh v. Hira Nath Sarma*[2] where an answer to the affirmative was given to the question "whether according to the law current in Bengal a transfer or conveyance by a widow upon the ostensible ground of legal necessity such transfer is not rendered so by the person

[1] (1908) I. L. R. 31 All. 71; L. R. 35 I. A. 169.
[2] (1914) I. L. R. 40 Calc. 1107.

whom the time is the next reversioner or to consider another person not a party thereto who is the actual reversioner upon the death of the widow in asserting title to the property."

This decision rests on the theory of an acceleration of the next heirs' interest occasioned by the widow's relinquishment in his favour.

The reasoning in effect is this — it is only the widow's interest that stands in the way of the next heir's succession that obstacle is removed by the determination of the widow's interest the determination can be effected by her death, civil or natural, by her remarriage or her husband's death and so by relinquishment later.

In English law, it is true, a disclaimer by an heir will have no effect, although he can elect to dispose of his inherited property by an ordinary conveyance but *Vyse v. Foster*[3] case appears to lay down a different rule, at any rate for a Hindu widow.

But as there cannot be a disclaimer of a part, so the relinquishment must be of the whole for it is only by a total relinquishment that the condition of the heir's ascertainment can be determined *Morgan Hanson Chandhury v. Hanson*[4].

It was suggested by the respondent that in *Vyse v. Foster's case*[3] the dealing was with a part of the property and as supporting this, reliance was placed on the language of Baggallay J. in a later case. But there is nothing in the report of *Vyse v. Foster's case*[3] that supports this view and an examination of the original record in no way helps the respondent's contention. Moreover, it is opposed to the line of reasoning on which the decision rests. Even more is it inconsistent with the language of the Privy Council in *Rukmini Bai v. Hanmant Rao Ghorpade* where it was said on appeal from Bombay "It must be accepted that, according to Hindu law the widow can accelerate the estate of the heir by renouncing absolutely and destroying her life estate. It was essentially necessary to withdraw her own life estate, so that the whole estate should vest at once in the grantee. The necessity of the removal of the obstacle of the life estate is a practical check on the frequency of such renunciations."

[1] (1884) I. L. R. 10 Cal. 1102.
[2] (1891) 5 C. W. N. 181.
[3] (1881) I. L. R. 8 Cal. 996 : L. R. 10 I. A. 30.
[4] (1887) I. L. R. 14 Cal. 626 : L. R. 14 I. A. 71.

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Starting then from the established position that the next heir's succession can be accelerated by relinquishment, it was determined in *Nobokishore's* case [1] as a logical consequence that the widow, with the next heir's consent, could alienate without any necessity.

But if logic is to have any place, the alienation so sanctioned must be of the entire estate. How far it can be said that the doctrine of acceleration consequent on relinquishment applies where the widow retains an interest in the purchased price, or the sale is little more than a change of investment, it is difficult to say, the cases do not refer to this. The road to the decision in *Nobokishore's case* [1] was not without its difficulties but the learned Judges felt it had to be travelled that titles might be quieted. But it is settled that there should be no extension of this Bengal doctrine. *Baijnath Singh v. Mst. Jaimala Bibi* [2] *Singh*.

Much reliance has been placed on the last decision of the Privy Council by the respondent in the argument before us, and Dr. Radhabehari has even contended that it is conclusive in his favour. There, by successive instruments, a widow purported to transfer for valuable consideration to her son in law the whole estate of her deceased husband whose heir she was. Subsequently the consent of the nearest reversionary heirs was obtained but they predeceased the widow. This consent took the form of a relinquishment embodied in two deeds. The transaction was impugned by those who at the widow's death, were the next heirs, and the question raised was whether the deeds confirming the sales by the widow to Maheshar, executed by the then nearest reversioners, and disclaiming all title to the property in dispute were binding on their descendants, the appellants, who were the nearest reversioners at the time when the succession opened, at the widow's death [3]. No new principle was formulated, that already established by prior decisions was applied to a novel set of facts.

The judgment, after stating that the principle is admitted, points out that the only question remaining for determination was the *quantum* of interest necessary. On this, the strictest

[1] (1884) I. L. R. 10 Calc. 1102. [2] (1907) I. L. R. 30 All. 1; L. R. 35 I. A. 1.

[3] (1907) I. L. R. 30 All. 1, 14.

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doctrine of Vyavahar was rejected in favour of the more tolerant view that ordinarily consent of the whole body of persons constituting the next reversioners should be obtained, though there might be cases in which special circumstances might render the strict enforcement of this rule impossible.

At the same time it was distinctly said that their Lordships would be unwilling to extend the widow's power of alienation beyond its present limit.

The result, then, of the authorities binding on us appears to me to be this. To uphold an alienation by a widow of her deceased husband's estate where she is to her it should be shown (1) that there was legal necessity, or (2) that the alienee, after reasonable enquiry as to the necessity, acted honestly in the belief that it existed or (3) that there was such consent of the next heirs as would raise a presumption, either of the existence of necessity, or of reasonable enquiry and honest belief as to its existence, or (4) that there was a consent of the next heirs to an alienation capable of being supported by reference to the theory of the relinquishment of the widow's entire interest and consequent accretion of the interest of the consenting heirs. Where any one of the first three positions is established the alienation may be of the whole or any part of the husband's estate, but where the fourth alone is proved, then the alienation must be of the whole.

Here the alienation is only of a part of the husband's estate, and that by way of mortgage — so that the fourth position cannot apply.

I would therefore answer the question proposed by saying that the alienation by way of mortgage by a Hindu widow as heiress of a portion of the estate of her deceased husband, without proof either of legal necessity or of reasonable enquiry and honest belief as to its existence but with consent of the next reversioners for the time being will be valid and binding on the actual reversioner at the commencement of a suit unless such consent is not rebutted by more cogent proof.

The case must be returned to the Division Bench for disposal in accordance with this answer to the reference.

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HARRINGTON J. The question in this reference is "If the alienation by way of mortgage by a Hindu widow of a portion of the estate of her husband without any proved legal necessity, but with the consent of the next reversioner for the time being, valid and binding on the next reversioner who is not the heir of the consenting reversioner?"

The question whether the widow can dispose of the whole of the estate of her deceased husband with the consent of the next reversioner for the time being must be regarded as having been settled as far back as 1881 by a Full Bench of this Court, in the case of *Nobokishore Sircar Roy v. Hara Nath Sircar Roy*.[1]

But in that case the decision does not appear to be based on any principle of Hindu law, it rather proceeds on the ground that there had been a long series of decisions affirming this proposition, and that many sales had taken place and titles had been accepted on the faith of these decisions which it would be unjust to disturb. Yet although the Chief Justice describes the transaction as a resumption-lease rather than a surrender, the decision can hardly be placed on that ground. No doubt when a woman becomes incapable of holding property by reason of her entering a religious order, she relinquishes her husband's estate; but she can hardly be said to be the case when she converts her estate into money and continues in the enjoyment of it in another form.

The views of the various High Courts in India on the question of alienations by a widow were considered by the Judicial Committee in 1907, in the case of *Bhoopendra Singh v. Mussamut Rukia Kooer*[2] in which, without pronouncing an opinion as to the grounds on which the principle is to be placed, their Lordships say: "Although being admitted by the High Courts in India, the *quantum* of consent has to be considered.

The result of these two decisions, which are both binding on us, is to establish that a widow can, without proof of legal necessity, alienate the whole of her husband's estate with the consent of the then next reversioner. But they leave the

[1] (1884) I. L. R. 10 Calc. 1103.
[2] (1907) I. L. R. 30 All. 1; L. R. 34 I. A. 1.

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principle on which such alienations are to be supported upon the Full Bench being decided on the ground that it would be unjust to disturb what had been settled for a long series of decisions, while the Judicial Committee affirm that the principle is admitted, but do not say on what ground it is to be taken as established.

It is contended by the appellant that the widow's power to make a title to a portion of her husband's estate cannot be placed on the ground that she has a power to *alienate*, but that to justify a sale or mortgage of a portion of the estate there must be legal necessity and that the consent of the then reversioner is at its highest only evidence that legal necessity existed or at any rate that the transaction was a proper one: while for the respondent it is contended that the widow and the reversioner for the time being represent the estate and are able to make a good title to the whole or any part of it so as to bind those who happen to be the next of kin of the deceased husband at the widow's death.

The former view is supported by the case of *Hebert Lal v. Mukha Lal Alias Ungoman*[1] which was decided on the Privy Council in 1871. This was however a case of a peculiar character. The widow did not convey out and out to the next reversioners but gave the estate to them subject to her having the estate for life. Before the widow died another reversionary heir had come into existence, and it was held that the conveyance executed by the widow could not operate to divest that reversioner.

But the conveyance passed the estate in possession at the time it was executed. It was not to affect the possession of the property until after the widow's death. It could well be said not to be a conveyance of the estate if the heir was a reversioner, for it was a conveyance to a person who might or might not be next reversioner at the time when the property passed under the conveyance.

The Privy Council say down that it was a customary necessity that the widow should withdraw her whole interest so that the whole estate should get vested in the grantee or say that

[1] (1871) I. L. R. 19 Calc. 336 (L. R. 19 I. A.)

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this will be a practical check on the frequency of such conveyances. It is not quite clear, I think, whether their Lordships meant by the words "whole estate" every kind of land of which the estate consisted—or whether they meant the absolute estate as contrasted with an estate subject to a preceding life interest. For the purposes of the judgment the latter proposition was necessary, not the former.

I do not think that this case can be regarded as affording an answer on the negative to the question submitted to us. If the words 'whole estate' mean every kind of land, then the case would afford an answer to the question, but I think that the words 'whole estate' refer to the nature of the estate in the property conveyed—and that the case does not afford an answer to the question before us.

It is, however, consistent with the proposition that the widow and the next reversioner sometimes represent the estate and are able to make such disposition of it as they choose—if they could they would be able to make the disposition which the Privy Council have held cannot be made—and it is an authority for the proposition that a widow cannot, even with the consent of the next reversioner, retain possession of the estate and make a disposition of it to take effect at a future time.

We are led therefore to the proposition that a widow can alienate with the consent of the next reversioner but such an alienation must be complete and effective—i.e., she must not retain possession of the property.

The question of difficulty is to say from what principle of law is this power in the widow to be supported. Is it on the ground that she can relinquish in favour of a reversioner, or on the ground that the consent of the reversioners is evidence that she is acting within her powers in alienating the estate?

The instances given of relinquishment are those in which the widow does something which destroys her capacity for holding property—such as entering a voluntary death, or entering a religious order. I think if relinquishment is to be taken in its widest sense it would involve a doctrine which rendered the widow no longer capable of being her husband's heir. It is true, nevertheless, that the texts recognise gifts

by the widow of a portion of the estate of her husband's kindred as meritorious. She appears, therefore, to have had a power of alienating portions of the estate while she still filled the position of being the possessor of the estate; but these powers, whether of securing to the whole estate by entering a religious order or alienating part by giving it to her husband's kindred, only enabled her to benefit the heirs of her husband, and did not enable her to get any advantage for herself.

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I do not, therefore, think that her power to alienate for valuable consideration can be placed on either of these grounds, for I think that when a widow converts her husband's property into money and says that she cannot be said to relinquish it, nor can she be said to make a gift when she receives valuable consideration for the conveyance.

Is it then to be taken that the consent of the next reversioners is evidence of two of the parties of the transaction? It may be taken merely as evidence, then it is open to be rebutted; and it can be shown that there was in fact no legal necessity for the conveyance; if on the other hand it is conclusive evidence, then it affords an answer to the question.

It is clear that a widow for her religious or charitable purposes, or for those which were supposed to conduce to the spiritual welfare of her husband, or under pressure of legal necessity, is entitled to sell or mortgage the whole or any portion of her husband's estate.

The transaction, therefore, was not one which as wholly outside the power of the widow. She might sell with the estate under certain circumstances, and if the consent is to be taken as conclusive evidence that these circumstances exist, there is an end of the question.

In the case of A[illegible] *[illegible]* decided in 1880, the consent of the three next reversioners was treated as evidence of the existence of legal necessity. The Judges do not say it was conclusive evidence; they say it gives rise to a strong presumption that such necessity existed in the absence of evidence of the want of legal necessity.

The case of *Hira Gunesh Hurdeo v. Hira Hurdeo*, decided in 1905, goes so far as to affirm the proposition that

* (1880) 6 W. R. 61. † (1905) I. L. R. 33 Calc. [illegible]

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an alienation of a portion of the husband's estate by the widow is valid even though there is no legal necessity, if made with the consent of the then reversioner. This case goes further than the case of *Hill & Lowther Mandal v. Narsingh Debi*,[1] decided in 1901, in which it is held that the widow may convey to the next reversioner or to a third party, with the consent of the next reversioner, the whole or any portion of the estate, and the transferee will acquire an absolute interest. The Judges however after hearing the facts and the cases say that they are not prepared to hold that the widow and the next reversioner are competent to deal with the property so as to convert the widow's estate (the capacity remaining in her) into an absolute estate.

The former of these two cases supports the proposition contended for by the respondent, but on the question whether the alienation would be held to be good, even if it were established that no legal necessity existed the case of *Pulin Chunder Mandal v. Hulas Mandal*,[2] is inconsistent with the earlier case of *Kuloo Mohun Deb Roy v. Bhuwany Shaha*,[3] and, moreover, it lays down what is not consistent with the judgment of the Privy Council in *Hur Lukhee Dabee v. Kowal Chunder Chuckerbutty*,[4] their Lordships say in reference to the effect of the consent of the husband's kindred, "there should be such a concurrence of the members of the family, as suffices to raise a presumption that the transaction was a fair one" and while saying it is not a *presumptio juris et de jure* they say "it is, no doubt an element to be taken into consideration, and deserving of considerable weight in the estimation of all the evidence of the transaction."

I think that the conclusion to be drawn from the cases is to show that the widow, with the consent of the then next reversioner, has the power of making an alienation of the whole or any portion of her deceased husband's estate—but that the power is limited to the extent that what is so done by the widow, with the concurrence of the then next reversioner, as by the then next reversioner can have the effect as against the actual

[1] (1900) I. L. R. 28 Calc. 304.
[2] (1905) I. L. R. 33 Calcutta [illegible] (1906) 3 C. L. J. 47
[3] (1866) 6 W. R. 31 12 Moo. I. A. 240

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reversioner of giving the widow a greater estate in the property than she has under the Hindu law—see *Hem Chunder Sanyal* v. *Saratmoyi Dasi*.[1] The widow and next reversioner are not, therefore, entitled jointly to deal with the estate as though their joint power was equivalent to that of an absolute owner.

I think the principle on which an alienation by the widow with the consent of the next reversioner is to be supported is that it raises a strong presumption that at the time of the alienation the persons then interested in preventing the alienation were unable to dispute its propriety; or, in other words, that circumstances existed which entitled the widow in accordance with the rules of Hindu law to alienate the estate so as to destroy the interest which might in future descend on the next reversioner as heir to her deceased husband. The presumption is a very strong one, and though not absolutely irrebuttable, evidence to rebut it would not affect the validity of the transaction, if it were established that the mortgagee or purchaser had given valuable consideration and had acted *bonâ fide* believing, on the faith of such consent, that circumstances justifying the alienation existed. I would therefore answer the question submitted to us in the terms which have been proposed by my Lord.

STRAIGHT, J.—In answering the question referred to us we have to deal with only one of the two methods by which a Hindu widow can alienate the property of her deceased husband in which she has inherited an estate. For present purposes, it may be taken for granted that her alienation of the whole or part of it can be supported by proof that it was necessary or, what is practically the same thing, for the purpose of benefiting her husband's kindred in one of the limited number of ways prescribed in the Hindu texts with which we are not immediately concerned. Further, one proof of the capacity in the purchaser into the necessity of the alienation, leading to an honest belief on his part that necessity existed, is taken to be a proof of necessity, as far as he is concerned.

Taking this to be so, the question to be resolved is—What is the effect of the consent to the alienation of the next heir to a

[1] (1891) I. L. R. 22 Calc. 251.

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the deceased husband for the time being." And on a review of the authorities that have been quoted to us, by which we are bound the answer seems to me as follows. In the first place, there is no doubt that the consent of the kindred not necessarily the next heir of the deceased husband to alienation by a Hindu widow is evidence that "the transaction was a fair one, and one just not by Hindu law." But it seems that the effect of such concurrence is at most to raise a presumption. *Rai Lakhee Debea v. Brij Bhookun Lall*[1]. Even for this purpose the consent of all the kindred is necessary and the circumstances of the concurrence of any of them must be considered. *Maun Singh Lal v. Lakha Ahoon*[2]. Ordinarily, the consent of the whole body of persons constituting the next reversioners should be obtained though there may be cases in which special circumstances may render the strict enforcement of this rule impossible. *Hanwanta Singh v. Bhagwanta Singh*[3]. I feel some difficulty in accepting the full scope of this rule but I have no doubt that it applies to a case where the consent of a reversioner is refused on an absolute assertion of the necessity of an alienation. On principle and on authority these rules apply where the alienation is of the whole or a part of the widow's estate.

In the second place, consent to the widow's alienation has an effect only on that alienation or cases where the widow may be supposed to have relinquished her rights over her deceased husband's property. That a Hindu widow can exist and relinquish her rights in favour of the reversioners is clearly laid down by Romesh Chunder Mitter J. in *Taruck Pershad Aur v. Shewbuksh Hemraj*[4] relying on the observations in *Nagendra Nath Sukul v. Sarat Sundari Debi*[5]. The decision in that case was confirmed on a Letters Patent Appeal, and the principle is recognised by the Privy Council in *Behari Lal v. Madho Lal Dhir*[6] where it is said that "the widow can accelerate the estate of the heir by conveying absolutely and extinguishing her own estate" but it is "essentially

[1] (1869) 13 Moo. I.A. 209
(1869) 1 I.R. 21 Art. 71
I.R. 2 I.A. 181
(1875) I.L.R. 50 Cal. 1
I.R. 5 I.A. 1

[2] (1874) 22 W.R. 303
[3] I.L.R. 18 All. 69 (P.C.)
[4] (1901) I.L.R. 29 Cal. 266 I.R. 29 I.A. 20

necessary " for her " to withdraw her own life-estate so that the whole estate should get vested at once in the grantee." The principle is also recognised by a decision of a Bench of this Court in *Vellasami Nainar v. Veerammal*,[1] but a conclusion is drawn from it by which I conceive that we are bound, and which in my opinion carries the matter very much further. In that case a widow sold to a stranger a share in a house which I understood to have been treated as the whole of the property inherited by her from her deceased husband. The reversioner then executed a separate document in which he assented to the conveyance by the widow and covenanted for himself and his heirs that he would not lay claim to the property at any future time. The reversioner then predeceased the widow and on her death the person who succeeded to the property was one who was not bound by the covenant of the previous reversioner. On these facts Smith C. J., after referring to the principle of Hindu law points out that it frequently happens " that a widow who is anxious to turn her husband's estate into money may arrange with the next heir of her husband for the time being, to alienate the estate to some third person for their mutual benefit. They may both share in the profits of such a transaction," and thus the person who would be the next male heir to the deceased husband at the time of the widow's death is deprived of his rights. He then goes on—" But, I do not think established, as a matter of law, that a widow may alienate her estate in favour of her husband's heir for the time being, it seems impossible to prevent any alienation which the widow and the next heir may thus agree to make." After putting a hypothetical case he goes on— " To allow the widow to alienate her estate to the next male heir of her husband as the thing, but to allow her to sell the whole inheritance without any legal necessity whatever with the consent of the next male heir so as to bar the rights of other heirs of her husband in the future, is another thing." He then points out, on authority and on grounds of practical convenience, that it is impossible to hold that the widow can put an end to the estate in the way described. Matter J., after pointing out that a widow can relinquish the whole of her estate to the next heir

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able.' But, if the widow is competent to relinquish her estate to the next male heir of her husband, it follows, as logical consequence, that she can alienate it merely with his consent, without any legal necessity,' referring to the decision in *Mohant Anukul Das* v. *Bhagat Das*[1] to show that the one proposition follows as a logical consequence of the other.

This decision is based on the principle of relinquishment, though that principle is not distinguished from or contrasted with, the principle of consent being evidence of the propriety of the alienation, and as I understand the matter, a sale by the widow with the consent of the reversioner is held on authority and for purposes of practical convenience to be equivalent to a relinquishment by the widow in favour of the reversioner, and a conveyance by him.

The difference between a sale by the widow with the consent of the reversioner and a sale by the reversioner after a relinquishment by the widow, may be to some extent a matter of form, a view to which the Judges who decided *Mohant Anukul Das's case*[1] seem to have inclined, but Garth C. J. expressly contemplates a case in which the sale is not only formally, but actually by the widow, because he supposes it to be made for the common benefit of the widow and the reversioner, and that they share in the profits of the transaction. A sale by which the widow receives the price of her husband's property does not seem to be a relinquishment, as that term is used in earlier cases and in the later case of *Behari Lal* v. *Madho Lal the Second*,[2] but there I read this case as extending the meaning of relinquishment so as to make it indistinguishable, so far as I am concerned, from alienation, and I hold nothing in the later case to the Privy Council overruling this construction. Personally I am fortified in this view by finding that Banerjee J. in *Hem Chunder Sanyal* v. *Nemai Sanyal*[3] acquiesced in the decision in *Anukul Das's* case,[1] however unwillingly he may have done so, and we are as much bound by it as he was.

[1] (1870) 14 W. R. 309.
[2] (1901) I. L. R. 23 Calc. 284.
[3] (1904) I. L. R. 31 Calc. 1103.

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On my view of the effect of the decision in this case, a difficulty arises as to whether the decision covers an alienation of a part as well as of the whole. In its terms, it seems not to, but in principle there is no reason why it should not and the Court in *Hanuman Singh's case*[1] seems to have thought it did. On the other hand, the decision in *Hanoo Lall's case*[2] which was given after *Nobokishore's case* though it does not notice it and before *Hem Chandra Sen's case*[3] is unmistakably clear as to the necessity for a relinquishment here of the whole property.

Under these circumstances I consider that the decision in *Nobokishore's case* makes a gift by a Hindu widow of all her interests in the property that she has inherited from her husband competent to pass an absolute title to the transferee if it is made with the consent of the three heirs of her husband and it has not been suggested in this case that a mortgage is to be distinguished in this respect from a sale. How far this rule may extend it is not necessary to consider exactly on the present occasion, though I think it may safely be said that it ought not to be out of sight of our starting point in the Hindu Law. But I do not think we are bound to apply the rule in question to a case where, as in the one before us, only a portion of the property in which the widow's interest is affected by her action. In *Hanuman Singh's case*[1] where the law laid down in *Nobokishore's case*[2] seems to be approved of the widow executed successive transfers of all the property she inherited from her husband, one to her kinsmen, and subsequently persons who, in view of the judgment of the Privy Council must be taken to represent the reversioners at the time entitled the widow's alienation. If we treat this case[1] as decided on the theory of relinquishment as well as on that of necessity being presumed from consent which I think we must the ratification applies at least to a complete alienation and the case is therefore no authority for extending the principle of *Nobokishore's case*[2] to an alienation of a part. This follows from a

[1] (1894) I. L. R. 22 Calc. 854.
[2] (1891) I. L. R. 19 Calc. 236; L. R. 19 I. A. 20.
[3] (1895) I. L. R. 10 Calc. 1102.
[4] (1907) I. L. R. 30 All. 1; L. R. 35 I. A. 1.

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consideration of the facts of the case, but it is also to be observed that their Lordships do not consider that they are laying down any new principle and express themselves as being "unwilling to extend the widow's power of alienation beyond its present limits." I therefore concur in the answer to the question before us suggested by the Chief Justice.

MOOKERJEE J. The question referred for decision to the Full Bench has been formulated as follows:

"Is the alienation, by way of mortgage by a Hindu widow of a portion of the estate of her husband, without any proved legal necessity but with the consent of the next reversioner for the time being, valid and binding on the actual reversioner who is not the heir of the consenting reversioner?"

The texts relevant for the determination of this question are those of Katyayana, Vyasa and Narada, quoted by Jimutavahana in the Dayabhaga Chapter XI section I paragraphs 60, 61, viz.:

"Let the childless widow preserving unsullied the bed of her lord, and abiding with her venerable protector enjoy with moderation the property until her death. After her let the heirs take it."

Katyayana.

"For women, the heritage of their husband is pronounced indivisible to sons. Let not women on any account make waste of their husband's wealth."

Mahabharata.

"When the husband is deceased, his kin are the guardians of his childless widow. As to the disposal of the property, and care of herself as well as of her maintenance, they have full power. But, if the husband's family be extinct or contain no male, or be help less, the kin of her own father are the guardians of the widow, if there be no relations of her husband within the degree of a sapinda."

Narada.

From these texts Jimutavahana draws the inference that it is competent to the widow to enjoy the estate for life, which goes, upon the termination of her interest to the heirs of her husband; it is also competent to her to make a gift or sale for the obsequies of her husband, and for other religious and charitable purposes; she may also, in case of necessity, mortgage

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the property, or sell or otherwise alienate it. We have consequently the principle that a widow can alienate the corpus of the property inherited by her for purposes of necessity, she can sell it, or mortgage it, and, in certain cases, she can even make a gift of a reasonable portion of it. *Collector of Masulipatam v. Cavaly Venkata*[1] upon this fundamental principle, has been engrafted, by judicial decisions, the equitable doctrine that a transferee is protected if he proves that he made proper and *bond fide* enquiries as to the actual existence of such alleged necessity and did all that was reasonable to satisfy himself as to the existence of such necessity. *Jugmohun Nath v. Ishan Koer*,[2] *Bhagwat Dayal Singh v. Deo Dayal Sahu*[3] and *Hanmanpersaud Panday v. Babooee Munraj Koonweree*.[4] It is, therefore, firmly settled that a widow takes only a restricted estate in the property of her husband, and that, at her death, it passes to the heirs of her husband, except as to such portion as may have been alienated by her for legal necessity. *Jugmohun Nath v. Ishan Koer*,[2] and it is beyond controversy that, upon this point there is no difference between the Dayabhaga and the Mitakshara schools of Hindu law. *Anund Singh v. Kundul Singh*,[5] *Collector of Masulipatam v. Cavaly Venkata Narrainapah*,[1] *Hanmant Pursad Pandey v. Mussumat Janki Koer*,[6] *Bhagwandeen v. Myna Baee*.[7]

The question next arises, whether apart from legal necessity, a widow is competent to alienate the corpus of the property inherited by her, with the consent of the then next reversioners, so as to bind the person who turns out to be the actual reversioner at the time of her death. This question was answered in the affirmative by the Bengal Sadar Court in *Ha[illegible]*

Hay and [illegible] v. [illegible]

[1] (1861) 8 Moo. I. A. 529: 2 W. R. [illegible]
[2] (1868) L. R. 3 Calc. 420: [illegible]
[3] (1856) 6 Moo. I. A. 393: 10 W. R. [illegible]
[4] (1820) Morton H. L. C. 477: [illegible]
[5] (1830) 2 Moo. I. A. 441: [illegible]
[6] [illegible]
(1886) 13 Moo. [illegible]
[illegible]
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Khadem v. *Mussamut Bepto* [illegible] *Hurrosoondri Bepto Dasee* v. *Mussamut Lungun Dasee*, and *Ramchunder Ahood Ram* v. *Mahomed Ismail Khan*. The reason for this conclusion does not appear to have been clearly formulated, even if appreciated in the earlier decisions. But reference is made in more than one place to the fact that according to the text of Narada, the relations of the husband are the natural guardians of the widow and they are not likely to consent to an alienation unless there is justifying necessity for it. In a very early case, however, *Hyder Ali Khan* v. *Jewun Nissa*,[1] the question was pointedly raised as to who were the relations of the husband whose consent was essential to validate the alienation by the widow. It was urged that an alienation by the widow to be valid must bear the assent of the next heir and the paternal kindred of her husband, and the same view was affirmed in *Kameswar Mookerjee* v. *Ahsan*. The point came for consideration later on the Judicial Committee in *Rani Narain Kuar* v. *Rani Adhar Kuar*,[2] but was not decided, though there Lordships referred without disapproval to *Hyder Ali Khan* v. *Jewun Nissa*,[3] the decision whereon was stated to have been founded expressly on the ground that the deed there in question was executed without the concurrence of the descendants in the male line, who, though they were not heirs, were guardians or protectors of the widow.[4] A similar view was accepted by the Bengal Sadar Court in *Hafizunnissa Begum* v. *Jewun Nissa*.[5] See also *Nundkumar Roy* v. *Rajendranarain*.[6] *Hurrosoondri Dasee* v. *Hurro* [illegible]. This view, however, was repudiated by the Supreme Court in a case decided shortly after, *Judoononey* v. *Ramlochun*,[7] in which it was ruled that the reversioners whose consent was necessary to

[1] (1810) 2 Mac Sel Rep 213 ; [illegible]
[2] (1905) 6 Mad Sel Rep 180 ; [illegible]
[3] (1812) 2 Mac Sel Rep 63 ; [illegible]
[4] (1813) 2 Mac Sel Rep 65 ; 6 I L D (U S) 302
[5] (1847) 4 Mon I A 229 ; [illegible]
[6] (1861) 1 Mac Sel Rep 213 ; 6 I D (U S) 280
[7] (1811) Mac Sel Rep 10 ; 6 I D (U S) 315 ; (1812) 1 Fulton 123 ; 2 I D (U S) 72

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validate an alienation by the widow consisted of that class of persons only who would immediately succeed to the estate if the widow's interest was determined and it did not include that wider class of persons who might by possibility become heirs on the happening of that event. Sir Charles Jackson J observed that where the widow's conveyance is executed with the consent of all the nearest heirs living at the time of conveyance, and there are no other heirs of preferable or equal degree living at the decease of the widow the whole estate in possession and the reversion has been sufficiently represented for the purpose of such conveyance, and the conveyance should be upheld.

The learned Judge referred to the note of Mr Colebrooke to the case of *Vishvanath v Andiappa*[1] to the effect that a "widow's gift of the estate to the next heir is good in law as such a gift is a mere relinquishment of her temporary interest in favour of the next heir although it may however happen that the person who would have been entitled to take the inheritance at her decease might be different from the one who obtained it under gift or relinquishment to him as presumptive heir, and if the title of that person be either preferable or equal, it may invalidate such gift in whole or in part." Here we see the origin of what may be called the relinquishment theory, first formulated by Mr Colebrooke, and applied, possibly unnecessarily, in the cases of *Mussumat Bhoy Dibeh v Mussumat Lopsoma Dibeh*,[2] *Collychurn Dutt v Hurro*,[3] and *Ramasami Sastri v Perachanna Bissi*.[4] Sir James Colvile, C.J., in the same case, *Jadumoney v Sivagnana*[5] expressly adopts the relinquishment theory as consistent with the letter and spirit of the Hindu law. He first described the nature of the estate of a Hindu widow in the words of Lord Hatherley in *Gunganarain Basak v Ramdoolal Byanat*[6] and accepts the view of the true position of a reversioner as defined by Sir Lawrence Peel, in *Gopalchunder Dutt v Sreemutty Dossee*,[7] and *Hurro Dass*

(1860) 1 Mad Sel Rep 54
6 I. J. (O S) 162
[2] (1863) 1 Mad Sel Rep 218
9 L. D. (O S) 139.
[3] (1867) Bourke 79
11 L. D. (O S) 287
[4] (1868) Bourke S. D. A. R. 641
(1869) 1 [illegible] 150
[5] 11 L. D. (O S) 2
[6] (1868) Moore H. L. [illegible] 427
11 L. D. (O S) [illegible]
[7] (1870) 1 [illegible] 470
13 L. D. (O S) 60

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Sruti v. Jeo Narain Roy [illegible]. The learned Chief Justice then points out that the policy of the Hindu law is not to keep the estate as long as possible, unalienable and subject to a species of entail in favour of persons unascertained but to prevent the devolution of family property from taking place either by operation of law in favour of the widow's natural heirs, who would generally be other than the heirs of her husband or in favour of strangers by the gift or other disposition of the widow. Reference is made in support of the view to the Vyavahara of Jimutavahana (Chapter XI, Section I, paras 56 and 61). As a matter of fact the theory of relinquishment is foreshadowed in the Dayabhaga, Chapter XI, Section I, para 54, where Jimutavahana has laid down that the persons who would be the next heirs on failure of prior claimants succeed to the goods of the estate remaining after her use of it, upon the demise of the widow to whom the succession had vested, in the same manner as they would have succeeded if the widow's right had never taken effect. The words used by Jimutavahana

अनाधिकारदः पक्षात् पश्चिकारः प्रवर्तेऽपि भोगावशिष्टं धर्मे सङ्क्रामयुः

("if her right ceases or never takes effect") are comprehensive enough to include not merely the case of the death of the widow, but all cases where her right ceases, in other words the reversioners take the estate not merely when the widow dies but also when her title is extinguished, for instance by remarriage, renunciation or the like. It is plain, therefore, that in both the principles were recognised by our Courts. According to one principle an alienation by a widow made with the consent of all the possible heirs of her husband was held operative because the consent of persons who were the guardians of the widow, and who were, as the next possible takers of the estate, most deeply interested in its preservation indicated the propriety of the transaction. *Ram Ruttun Roy v. Bhuwanee Shuker*,[1] *Hurbut Khanim v. Imtiaz Khanim*.[2] According to the other principle, an alienation by a widow, made with the consent of the entire body of the immediate reversioners, was held operative because between the widow and the reversioners the entire estate was represented inasmuch as

[1] (1851) 2 Tay & Bell 270; 2 I. D. (O. S.) 744.
[2] (1880) 6 W. R. 51. [3] (1869) 11 W. R. 280.

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the widow ought to relinquish her estate in favour of the reversioners and create in them a present indefeasible interest. These two doctrines, as is plain from an examination of the texts and from the history of the judicial decisions on the subject, were entirely distinct in their conception and development. But, as an examination of the cases shows the distinction was subsequently overlooked, and the indiscriminate application of the two principles has caused much embarrassment.

In so far as the consent theory is concerned it is plainly indicated by Turner, L. J., in *Hindoomull v. Hindoomull*, 2 Knapp's Privy Council Reports, 1, in the following passage: "It may be taken as established that an alienation by her to widow which would not otherwise be legitimate may become so if made with the consent of her husband's kindred. But it surely is not the necessary legal consequence of this latter proposition that on the absence of collateral heirs to the husband or on their failure, the latter on the widow's power of alienation altogether ceases. *The consent of the kindred must be given at the time of the alienation, and that consent cannot be given for a future alienation. It must be proper.*"

The same view is expressed by Sir James Colvile in *Lekhraj Kuar v. Mahtab Chand*, 16 Moore's Indian Appeals, 420, thus: "Their Lordships do not mean to impugn those decisions which have held that a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred in such case must generally be understood to be those who are likely to be interested in disputing the transaction. At all events there should be *such a concurrence of the members of the family as suffices to raise a presumption that the transaction was fair and was entered into by them.*" That it can be a presumption of law in the sense of *praesumptio juris et de jure*, their Lordships do not think. It is, no doubt, an element to be taken into consideration and deserving of consideration weight in the estimation of all the evidence of the transaction."

(1873) 9 W. R. (P. C.) 31
(1873) 11 Moo. I. A. 139

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Again, in *Mian Sardar Ali v. Mian Amir* [1] Lord Davey gives expression to the theory that consent of reversioners merely affords proof of the propriety of the transaction, in the following terms: "At the date of the bond of 1877, Hulas Kuar, as the heir of Khairati Lal was the owner of his estate, but with a restricted power of alienation. Achhan Kunwar was next in succession, and would, if she survived her mother, become her father's heir and take the estate, subject to the same restriction. Inayat Singh was one of the two male heirs next in succession to the restricted estate who would be full owners in the event of their surviving their grandmother and mother. Inayat was moreover a minor. At the date of the bond of 1881, Achhan Kunwar was owner of the property for a daughter's estate with restricted power of alienation and Inayat Singh was one of the heirs apparent. At both dates Inayat Singh was living in his father's house and dependent upon him. In 1877 neither Achhan Kunwar nor Inayat Singh (even if he had been of age), could by Hindu law make a disposition or bind the reversionary interests, nor does the deed apply to any but rights in possession, and in 1881 Inayat Singh was equally incompetent to do so, though the deed purports to bind future rights. To give validity to the bonds as against the estate of Khairati Lal, the plaintiffs and appellants must show that there was legal necessity for raising the money by a charge on Khairati's estate, or, at least, that in advancing their money the creditors gave credit on reasonable grounds to representations that the money was wanted for such necessity. It is not a case in which all the kindred of Khairati have assented or could assent to the bonds, or either of them, *and the circumstances are not such as, in the opinion of their Lordships ought to give any presumption, or such convenience as there was of Achhan Kunwar and Inayat Singh on the first bond or of Inayat Singh on the second bond, that the transaction was a fair one or one just and by Hindu law. In order to raise such a presumption the consent of the deceased's kindred to his widow's or daughter's alienation must be shown to be given with a knowledge of the effect of what they were doing and an intelligent intention to consent to such effect.*"

[1] (1909) I. L. R. 31 All. 73; L. R. 36 I. A. 183.

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On the other hand, the relinquishment theory was clearly explained by Lord Morris in the case of *Behari Lal v. Madho Lal (her Guardian)*[1] in the following terms: "At the time of the execution of the *ekrarnama*, Madho Lal was not born, so that the plaintiff was then the apparent reversionary heir, subject to the life estate of his grandmother, Lachoo Dai. *It may be accepted that, according to Hindu Law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate. It was essentially necessary to withdraw her own life estate, so that the whole estate should get vested at once in the grantee. The necessity of the removal of the obstacle of the life estate is a practical check on the frequency of such conveyances.*"

The two doctrines, thus formulated and applied came up for examination by their Lordships of the Judicial Committee in *Rajrup Singh v. Nandkuar* to *Bakhsh Singh*[2] and it is remarkable that neither theory was expressly repudiated or approved, though detailed reference was made to judicial decisions in which either the one or the other principle had found acceptance. Under these circumstances I think, the inference may legitimately be drawn from the decision of their Lordships in *Rajrup Singh v. Mussamat Bakhsh Singh*,[2] that both the doctrines are well founded on principle the only question is, what are the limitations or qualifications, if any, subject to which each of these doctrines has to be applied. If the widow has alienated the whole of the estate of her husband with the consent of some only of the immediate reversioners, or, if she has alienated a part only of the estate of her husband with the consent of all the immediate reversioners, or again, if she has alienated part of the estate of her husband with the consent of some only of the immediate reversioners, the consent merely furnishes evidence of the propriety of the transaction or of the fact that the transferee has taken after due enquiry as to the existence of legal necessity. The presumption which thus arises from the consent of the reversioners is not conclusive and is rebuttable, but, plainly, there is no room for the application of the relinquishment theory. In each of these cases,

[1] (1901) I. L. R. 19 Calc. 236; L. R. 19 I. A. 56.

[2] (1907) I. L. R. 30 All. 1; L. R. 34 I. A. 142.

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either the widow has not absolutely conveyed and destroyed her limited estate or she does not accelerate the estate of the entire body of immediate reversioners. On the other hand, if the widow transfers the entire estate of her husband with the consent of the whole body of immediate reversioners, the relinquishment theory becomes forthwith applicable. The position is precisely the same as if the widow had withdrawn completely and in its entirety her own qualified estate, and the whole estate had vested at once in the entire body of immediate reversioners, who, upon the acceleration of their estate, had conveyed an absolute interest to the transferee. The distinction between the two classes of cases is fundamental and well marked, and if it is borne in mind, we can appreciate without difficulty why Sir Andrew Scoble observes in *Rajendra Singh v. Hanuman Bakhsh Singh*[1] that ordinarily the consent of the whole body of persons constituting the next reversioners should be obtained, as laid down in *Radha Bibi v. Jay Kishen Sahai*,[2] but that there may be cases in which special circumstances may render the strict enforcement of this rule impossible. The view is consistent only with the doctrine that consent of reversioners in certain cases as a treaty explained, merely furnishes presumptive evidence of the propriety of the transaction from the standpoint the rule laid down in *Hospital Bros. v. Port Advocate*[3] cannot be sustained. On the other hand, the class of cases to which the relinquishment theory as applicable is easily defined. There are cases in which two elements are present, namely, *first*, a transfer by the widow of the entire inheritance in her hands and *secondly*, the consent of the entire body of persons who would be entitled to succeed upon the extinction of the qualified estate of the widow. This view I venture to think, does not really militate against the decision of the Full Bench in *West Shore Stone Ry. v. Haji Nath Saran Ry.*[4] Sir Richard Garth clearly contemplated a case in which the analogy of relinquishment of her estate by the widow could be applied. He speaks explicitly of the death of the widow or of the renunciation of the world by her, or of some act by her which might in the eye of law

(1945) 1 L. R. 20 All. 1 (P.C.) = 47 Bom. 500 L. R. 25 I. A. 3.

[2] (1948) 1 L. R. 6 All. 110

[3] (1884) I. L. R. 10 Calc. 1000.

justify the inference that she was merely dead. The learned Chief Justice also refers to the contingency of a disclaimer by her at the time of the death of her husband. In each of these instances, her interest in the entire estate left by her husband would be withdrawn from her and become vested in the then immediate reversioners. Mr. Justice Ramesh Chandra Mitter is equally explicit on the point. He plainly contemplated a relinquishment of the entire estate by the widow in favour of the then next male heir of her husband. I am not unmindful that Mr. Justice Banerjee, who, when at the Bar successfully argued the case of *Srikrishna Sircar Jha v. Hur Nath Sircar Roy*,[1] on behalf of the respondent, stated in the case of *Hem Chunder Sirkar v. Narainee Debi* that the principle of the Full Bench decision is applicable to transfers of part of the estate as of the whole and this was subsequently accepted without question in *Hafiz Chunder Sirkar v. Hafiz Hurdut*.[2] An examination of the record, however, in the case of *Srikrishna Sircar Jha v. Hur Nath Sircar Roy*[1] does not confirm the view taken by Mr. Justice Banerjee. On the other hand, so far as I can gather, the alienation in controversy covered the entire estate and was made with the consent of the entire body of immediate reversioners. The two points which were considered by the Full Bench were in essence these namely, *first*, whether a transfer by the widow with the consent of the immediate reversioner could be treated as equivalent to a transfer by the widow to the reversioner followed by a transfer by the latter to the purchaser, and, *secondly*, whether a transfer by the widow to the immediate reversioner stood on the same footing as a total relinquishment by her. Upon the first point it was ruled in accordance with previous decisions *Shama Soondari v. Nobo Coomar Jha*[3] *Mohunt Kishen Jeer v. Hemant Jha*[4] *Parsh Ram Jha v. Shamlakanth Burmon*[5] *Vithalrao Jha v. Khandu Rao Khan*[6], that the question was one of form rather than of substance, and, that consequently, a conveyance by the widow with the assent of the immediate reversioner might be deemed to operate precisely in the same manner as two conveyances, on

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(1884) I. L. R. 10 Calc. 1...
[2] (1894) I. L. R. 22 Calc. ...
[3] (1908) I. L. R. 35 Calc. 930.
[4] (1867) 8 W. R. 300.
[5] (1870) 14 W. R. 270.
[6] (1874) 22 W. R. 30.
... I. L. R. ... Bom. ...

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by the widow to the reversioner and the other by the reversioner to the transferee. Upon the second point, Sir Richard Garth was inclined to take the view that a sale of the whole inheritance by the widow to the immediate reversioner did not stand on the same footing as a real relinquishment by her, and, apparently, Mr. Justice Pigot was of the same opinion, but, in view of a series of prior decisions of this Court (*Roy Hulloth Sein v. Ramesh Chunder Roy*,[1] *Tricoum Chuckerbutty v. Umesh Chunder Lahiri*[2]), they acceded to the contention that a transfer of the whole inheritance to the next male heir might be treated as a relinquishment by her in his favour. If the matter were *res integra*, I would without hesitation adopt the view that a sale by the widow of the entire inheritance to the then immediate reversioner does not possess the characteristics of a real relinquishment by her, as contemplated by Hindu law-givers. A widow who transfers the property for a consideration or retains an interest in the purchase money, cannot, by any stretch of language, be deemed to have relinquished her interest in the estate of her husband; the estate by her action, has, in essence, only undergone a transformation, and the immoveable property has been converted into money which may be stuffed out of sight as land never can be. But if this street view was not acceptable in 1884 on the ground of *stare decisis*, much less can it be pressed now. I do not, therefore, rest my conclusions on this, the strictly legal view of the matter, especially in view of the fact that if the relinquishment theory is restricted in application only to cases where there is a real relinquishment, that is, a real abandonment by the widow of her interest, the strongness of the rule may be evaded in practice by the execution of a formal deed of relinquishment and a secret payment of consideration to the widow or a separate agreement to pay her maintenance allowance for life. I assume, consequently, as Sir Richard Garth did, that when a widow sells the entire inheritance to the immediate reversioner, she relinquishes her estate in his favour. This view was in substance adopted by Lord Morris in *Hetnarain Lal v. Woodha Lal (the younger)*[3] when he stated that according

[1] (1878) 3 L. R. 5 Calc. 66.
[2] (1880) 7 C. L. R. 71.
[3] (1891) L. R. 19 Calc. 230; L. R. 18 I. A. 30.

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In Hindu Law *the widow ceases to represent the estate of the husband by conveying away her interest and the reversioners become entitled to the estate.* Beyond this proposition based, as we have seen on somewhat questionable grounds, we need not go and, as I read the judgments in *Nobokishore Sarma Roy v. Hara Nath Sarma Roy*, we are not required to go even to the Full Bench decision. The principle of that decision is applicable only when the transfer by the widow is of her entire interest in the estate inherited by her from her husband and is made with the consent of the whole body of immediate reversioners an extension of that principle to cases where either of these elements is absent is not warranted by the language used by the learned Judges nor can it be deemed a logical development of the principle acknowledged by them as the foundation of their decision.

Upon an examination, then, of the texts and judicial decisions applicable to this matter, and upon a review of the principles which underlie them, the following propositions appear to be deducible :

(1) When a Hindu widow has alienated in whole or in part, the estate inherited by her from her husband the transferee can establish a good title as against the reversioners here after her death, if he proves that the alienation was made by her for purposes of legal necessity.

(2) When a Hindu widow has alienated, in whole or in part, the estate inherited by her from her husband, the transferee can establish a good title as against the reversioners here after her death, if he proves that he made proper and *bona fide* enquiry as to the actual existence of legal necessity and did all that was reasonable to satisfy himself as to the existence of such necessity.

(3) When a Hindu widow has alienated, in whole or in part, the estate inherited by her from her husband, with the consent of the reversioners here, such consent may raise the presumption that the transfer was for legal necessity or that the transferee had made proper and *bona fide* enquiries and had satisfied himself as to the existence of such necessity. The question of consent necessary to raise this presumption depends

* (1884) I. L. R. 10 Calc. 1067

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upon the facts of each particular case and, in all cases, the presumption raised by such concurrence on the part of the reversioners is rebuttable.

(xi) When a Hindu widow has alienated her entire interest in the estate inherited by her from her husband, with the consent of the whole body of persons entitled to succeed as immediate reversioners hereto, the transferee acquires a good title as against the actual reversioners here at the time of her death.

In view of this exposition of the law, I will in entire agreement with the learned Chief Justice, that the question referred to the Full Bench should be answered as follows:

Where an alienation by way of mortgage has been effected by a Hindu widow in respect of a portion of the estate of her husband, with the consent of the next reversioner for the time being, such consent may raise a presumption that the transaction was for legal necessity or that the mortgagee had acted thereon after proper and *bona fide* enquiry and had satisfied himself as to the existence of such necessity but this presumption, when it arises is rebuttable, and it is open to the actual reversioner to establish that there was in fact no legal necessity and that there had been no proper and *bona fide* enquiry by the mortgagee.

Henwood J. I agree with my Lord. The facts of this case and many similar cases which come before the Courts clearly show that the consent of the next reversioner for the time being must be hedged in with safeguards if there is to be any limit to the widow's power of alienation.

A spendthrift young man who happens to be the next reversioner at the time of the alienation enables the widow to raise money on mortgage for the benefit to be spent by him on his own immoral or wasteful purposes. The only legal principle upon which such a condition of things could be justified is that the widow has entirely relinquished the estate to the next reversioner so as to cast on him the whole responsibility for the waste of the ancestral property. In the absence of such relinquishment there must be such a consent by the next reversioner as to raise a presumption that the transaction was a fair one and one justified by Hindu law. Such a

presumption can only arise with reference to the circumstances of each case

It is unnecessary to refer to the cases which have been dealt with in the judgment delivered by my Lord which are legal necessity to prove or presume from facts. If the question is answered in the way my Lord the Chief Justice proposes to answer it, it seems to me that all difficulties will be met and matters cleared up in the exercise of the testator's power of appointment which is conferred by these provisions of the Judicial Committee in their latest decision

[illegible]

[illegible] purposes. An exhaustive enumeration of these religious or [illegible] by way of [illegible] 22 C. L. J. 345. A Hindu widow, daughter or mother, to [illegible] a small portion of the estate in her hands for religious purposes [illegible] *Hanmanta v. Ram Gopal*, 17 C. W. N. 782, *Jagadbandhu v. [illegible]* (1911), *Kapur v. Sohan*, 1 Bom. 415 (*Ram Lal v. [illegible]* v. *Narayan* (1901) Mad. 8 M. A. 74, *Rama v. Ramu*, I. L. R. [illegible] *Lakshmi Narayana v. Devi*, I. L. R. 11 Mad. 248, *Gopi* [illegible] *Mad. 255, Subbaraya v. Kuppu*, 24 M. L. J. 221 and *Parvati Devi v.* [illegible]

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There is a duty on a testator's legal personal representative to carry out the purposes of the will and the personal representative of the deceased trustee of the deceased husband and that within proper limits he is also under a duty to exercise the powers of investment conferred by the will of the deceased trustee in a manner which a prudent owner of property would exercise in dealing with his own property for the purposes of managing it and having regard to the interests of those who are entitled under the will to the property (*Re Lucas, Lucas v. Lucas* [1922] 1 Ch. 483 C.A.).

It is not possible to define the extent and limit of the power of the court to interfere with a trustee's property for exchange purposes for it depends upon the circumstances of the transaction, whether such disposition is made bona fide and in accordance with the law regulating the disposition of property (*Hoare v. Hoare* (1886) 2 T.L.R. 420).

In equity also a transaction by which property was held in trust was necessary in interpreting the term "necessity" the provision of the extent of proof upon those who propose it. It has been held that the best proof of necessity will be when the two conditions concerned to an account will be taken when the man most interested in its subsistence. If his account has been objected there is a presumption that the transaction is justifiable. This rule of procedure has led to the general notion of the question depending upon the nature of the case. It is now well established that the consent must have been given bona fide.

Assent might be given to the application by expedient arrangements of the investment of property by a trustee whether by exchange or sale that the trustee was made under the power which rendered it lawful and valid (*Re Wragg, Lloyds Bank Ltd. v. Wragg* [1919] 1 Ch. 490 C.A.). In that case the question was as to the validity of an exchange by a trustee which was agreed to with the consent of the then co-trustees and which was part of an arrangement or settlement in which all the members of the husband's family shared.

The language of the decision of the Privy Council in *Re Kaikhosru v. Kaikhosru* [1914] A.C. 223 [1914] 1 K.B. 47 Cas. 370 P.C. [1914] 1 K.B. 41 A.C. seems to indicate that the assent by the trust beneficiaries amounting to the absence of the party that it is an equity in favour of the trustee. If the trustee's beneficiaries have gone a step further than in the case of *Re Kaikhosru v. Kaikhosru* [1914] 1 K.B. 41 Cas. 370 P.C. [1914] A.C. 223 in that trust even their Lordships have

The position of the court as to valid and legal necessity may be necessary to fulfill with by proving the consent or acquiescence of the beneficiaries [illegible] in the transaction. But the mere circumstance by a positive act might be ought to be contingent restrictions does not necessarily imply consequence.

"When such a stringent equity as arises out of an alleged consent by the person more ought to be enforced against them such a consent should not be allowed to rest on mere vague words to be supported by dubious oral testimony but must be established by proof of facts from which the court can infer that upon an entire understanding of the nature of the dealings they concurred in binding their interests."

But whether such case must generally mean all those who are likely to be interested in the trust the transaction, or at all events those who might be

such a contingency of the members of the family as subsists in cases provided for by the texts. Consequently it was not justified by Hindu Law.

(1913) 40 Calc. Prasad Chowdhury v. Gokul Chunder

A mortgage by a Hindu woman entitled only to the usufruct of a portion of joint estate raises a presumption that it was entered into for legal necessity. It cannot prevail against the reversionary interest. Nabin v. Hari, 21 C. W. N. 30.

The word necessity should be given a liberal interpretation. A trader or a person engaged in some business may borrow money and a Hindu widow is not bound to stand by without regard to circumstances. As the very nature of the business requires borrowings for capital and owing to fluctuations in price relative to the amount of the transactions in the granting of debts or credits and incurring fresh business liabilities by the widow as to be most inadvisable if not impossible to bind her by the necessities [illegible] Vol. [illegible] (1913) 40 Calc.

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March 10, 16, 17 to June 20

RAMCHANDRA MARTAND WAIKAR AND OTHERS
AND
VINAYAK VENKATESH KOTHEKAR AND ANOTHER

[Reported 1 R. Hyd. 280; 11 R. 424 (P.C.); 38 I. A. 54; 5 Sar. P.C.J. 18; 18 C.W.N. 1152 P.C.]

The facts of the case were as follows:

The suit was instituted by the appellants, three brothers, to recover possession of immovable properties which they claimed as reversioners here, according to the Mitakshara law, of one Lakshman Rao. As appears from the pedigree set out in the judgment of their Lordships, the appellants, claiming through their mother Rangoobai, were sixth cousins once removed in the usual way, namely, excluding both host and last as a degree from Timaji Pant, the great-father of Lakshman Rao. The respondents (defendants) were the husband of Lakshman Rao's deceased daughter and their son.

It was admitted in the present appeal, though it had been otherwise contended by the respondents in India, that the family of Timaji Pant was governed by the Mitakshara law.

The judgment of their Lordships was delivered by

Mr. Ameer Ali. The suit that has given rise to the present appeal was brought by the plaintiffs in the Court of the District Judge of Balaghat, in the Central Provinces of India, for possession of certain properties which originally belonged to one Lakshman Rao, whose next of kin or heirs they claim to be under the law of the Mitakshara.

Lakshman Rao died in 1861, leaving him surviving his widow Jankibai and a daughter Chitkobai, both of whom deceased. The defendant Venkatesh is Chitkobai's husband. On Lakshman Rao's death without male issue his inheritance devolved on Jankibai. She held possession of the properties in suit as a Hindu widow until her death in 1884, when Chitkobai

* Present: Lord Moulton, Lord Parker of Waddington, Sir John Edge, and Mr. Ameer Ali.

succeeded to her father's estate. She died on May 7, 1914, leaving the first defendant, her husband. The second defendant is a son adopted by him after Chithoobai's decease.

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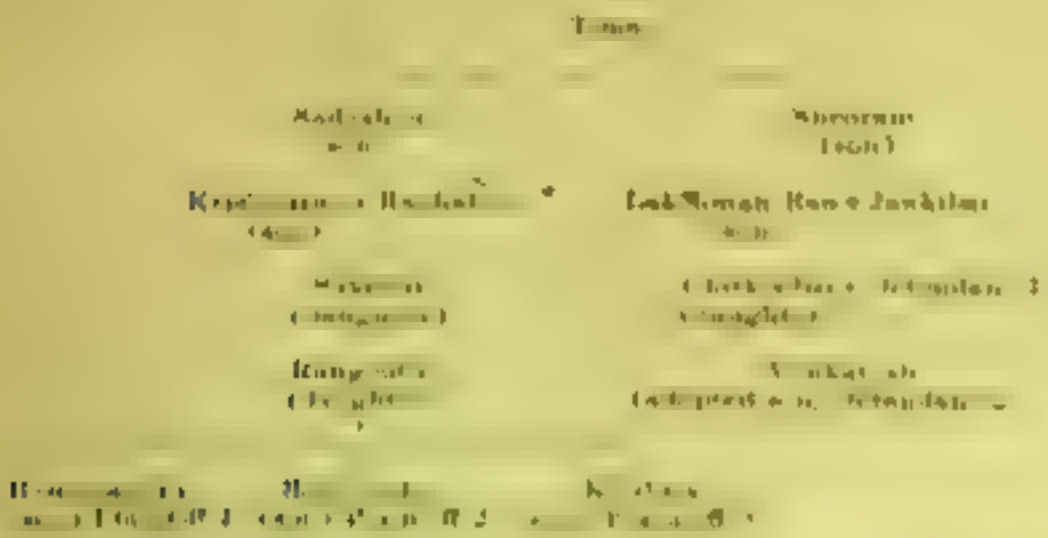
The present action was instituted in March, 1916. The plaintiffs claim that the inheritance to Lakshman Rao opened to them on the death of Chithoobai, and that they are entitled to recover possession of the properties from the defendants who have no right of succession to Lakshman Rao's estate.

The following genealogical table will explain the relative position of the parties and the exact nature of the claim :—



The defendants resisted the claim mainly on two grounds. They alleged first that the ancestors of the parties had migrated to the Central Provinces from Aundh, a state within the Mahratta country, where the law in force conferred on the daughter succeeding to her father's immoveable property an absolute estate descendible to her own heirs. That the family of Timaji was still subject to that law, and that accordingly the estate which Chithoobai had acquired passed on her death without issue to the first defendant, her husband. In the second place, they urged that the plaintiffs had no heritable right or interest in Lakshman Rao's estate as they did not come within the category of heirs entitled to succeed to the inheritance.

The Courts in India have overruled the first plea, and have held that on settling in the Central Provinces the family of

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Tomap adopted the lex loci and are now governed by the rules of the Mitakshara generally in force there.

But they have given effect to the defendants' second contention; they have held in substance that the Mitakshara lays down a well defined limit where the kinship entitling bandhus to succession ceases, and that the plaintiffs are beyond that limit. They have accordingly dismissed the suit.

The plaintiffs have appealed to His Majesty in Council, and the case has on both sides been argued with considerable ability and learning.

In dealing with the arguments addressed to this Board on behalf of the appellants their Lordships cannot help noticing one circumstance, namely, that in the Courts below, so far as appears from the record, it was not denied that there was a limit to the heritable right of bandhus, the only contention being whether it was seven degrees from the common ancestor or five as urged by the defendants. Before this Board, on the other hand, it has been strenuously contended that there is no limit to the succession of bandhus. Their Lordships do not seek, however, to draw any inference from this change of ground, for what they have to determine in this appeal is whether the term bandhu is to be construed as the plaintiffs argue in the broadest sense, or whether it is subject to any limitation, and in the latter case what that limitation is according to the law by which the parties are governed.

In the Hindu Law the succession of heirs individually specified does not present much difficulty; the controversies and divergences amongst Hindu lawyers are chiefly concerned with collateral succession. Manu, the ancient sage whose identity is lost in the mist of ages, but whose words is regarded as divine, after giving the rules regarding the succession of lineal male descendants and male ascendants, declares: "The property of a near sapinda shall be that of a near sapinda."[1] Sir William Jones in his translation of Manu's Institutes has rendered the passage somewhat differently, but for the purposes of the present judgment this difference is of little importance.

[1] Chapter IX. v. 187. This is the translation given by Sarkar and Banerjee JJ. in Bebi Lal v. Sooku Ram, I.L.R. 42 Calc. 338, at p. 346.

It is upon this consideration that all the schools base the right of collaterals to succeed to the inheritance of a deceased person. This refers only to the succession of one male to another, for females cannot by any means be. The right of collaterals, therefore, is dependent on the existence of the sapinda relationship between the propositus and the claimant. The contest that has arisen in the several schools is with regard to the meaning to be attached to the term sapinda or, in other words, what does sapinda relationship imply and what is the true test for determining whether a particular person is a sapinda to the deceased or not? Jimutavahana, the author of the Dayabhaga, the governing authority in the Bengal or Eastern school, proceeds it to mean "community in the offering of funeral oblations." He draws his argument from the word pinda which literally signifies a ball of rice offered at the performance of obsequial rites. Mr. Lowndes is probably right, that originally the right of inheritance was dependent on the right to participate in the offering of funeral oblations, a doctrine which is part and parcel of the Dayabhaga rules.

But it is also clear that Vijnaneswara, the author of the Mitakshara, who appears to have flourished towards the end of the eleventh and the beginning of the twelfth century of the Christian era, some five centuries before Jimutavahana, abandoned the ancient doctrine and construed sapinda relationship to arise from community of blood or, to use the plainer language of Hindu writers, "community of particles of the same body." His legal conception in this respect will appear clearly from a passage of the Mitakshara, Book I, Chapter on Marriage, not extracted in Mr. Colebrooke's translation. To this passage their Lordships will have to refer later on in the course of this judgment.

Messrs. West and Bühler in their Digest of the Hindu Law, the merit and authority of which has been recognized by eminent Hindu lawyers, have examined in detail the doctrines of the Mitakshara on this point, and their general conclusions as to Vijnaneswara's legal conception of sapinda relationship is summed up in the following words, that he has "not made the presentation of funeral oblations but descent from a common ancestor, and in the case of females also on marriage

with descendants from a common ancestor." Mr Colebrooke in his rendering of the Mitakshara has paraphrased sapinda as "relations connected by funeral oblations" which resulted in virtually obliterating one of the main distinctions between the Benares and the Bengal schools. But it is now recognized that the Mitakshara was erroneous and that the true theory of sapindaship propounded by Vijnaneswara was based on community of blood. It is on this theory of Vijnaneswara that the courts moved for the appropriate place in the chain of relationship. The sapinda relationship is consanguinity relation by blood. They are the relations, the sapindas and consanguinity to the exclusion of remoter kinsmen and that is the main basis. It is to be remarked as has been observed in previous cases before this Board, that the Hindu law contains no principle of exclusion and that questions arising must be determined on abstract considerations of propinquity and other matters which must depend for their decision on the ordinary evidence commonly in use in such inquiries and recognized expounders.

The Mitakshara purports to be a commentary on the work of Yajnavalkya who is supposed to have lived about the second century after Christ or about a thousand years before Vijnaneswara. In the Mitakshara he speaks of the terms of propinquity and his doctrine is based on Vijnaneswara certainly has a marked advance over the legal conceptions of the previous writers. So far as their principles have been able to ascertain the law on the various matters connected with the division of property, make their appearance as here first in Yajnavalkya with some variations. Mr Borradaile, in the first volume of his Lectures on Hindu Law, Sketches Hindu Adoption and Succession. Mr Borradaile, in the first volume of his Lectures on Hindu Law, Sketches Hindu Adoption and Succession. A general knowledge of the contents of this great and important work of Hindu Law. It consists of three books. The first called the Achara-adhyaya. On Ecclesiastical Rules of Conduct; the Vyavaharadhyaya or the Law and Customs of the People. Both books, however are so interrelated that the one cannot properly be construed without reference to the other.

It is to be noted that in the Vyavahara Chapter the first book on Ecclesiastical Rules of Conduct is treated as the Achara Adhyaya

(Chapter 6: Book ... Establishing ... Hindu Law ... to the decisions of the Indian Courts and ... Hindu Law ... a reference to ... of the Vedas ... (" Division or Partitioning to Established Usage and Custom

In the third chapter of the Vyavahara-kanda Yajnavalkya ... down ... relating to the ... of kindred, and ... between ... of ... This passage ... to be found in ... Digest of Hindu Law ... West and Bühler ... and ... in the ... of the Bombay High Court ... which ... came on appeal to Her Majesty in Council and was ... by this Board.[1]

That passage ... He ... and ... non-sapinda ... heirship. Next ... sapinda ... particles of ... and ... Non-sapinda ... and ... small matter. Sapinda-relationship ... between ... through their being connected by ... of ... The ... and ... sapinda-relationship to his father because ... particles of ... father's body having entered (by ... (mother) stands ... sapinda-relationship) to his ... great-grandfather and ... rest ... through his ... particles of his grandfather's ... Just so ... the son's sapinda-relationship of ... by ... particles of his mother ... Likewise ... grandson stands ... sapinda relationship ... great-grandfather and ... rest through his father. So also ... the nephew) a sapinda relation of ... and ... the rest, because particles ... same body ... father) have entered ... Likewise ... stand in sapinda-relationship with paternal ... and the rest. So also ... relations to each other, because they ... body (the son). In like manner ... sapinda relations to each other), because they produce our body (the son) with those (severally) who have sprung from our body ... because they bring forth sons by their ...

[1] 3rd ed. (1884) Vol. I., p. 120 ... I. L. R. 7 Bom. Ap. 212.

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of one person, and thus then husband's father is the common bond which connects them. Therefore one ought to know that wherever the word sapinda is used, there exists between the persons to whom it is applied) a connection with one body, either immediately or by descent."

Then after refuting certain objections to his explanation of the word sapinda, Vijnaneswara proceeds thus[1]: "In the explanation of the word 'asapindam' (non-sapinda, verse 52), it has been said that sapinda-relation arises from the circumstance that particles of one body have entered into the bodies of the persons thus related either immediately or through (transmission by) descent. But inasmuch as this definition would be too wide, since such a relationship exists in the eternal cycle of births, in some manner or other between all men, therefore the author (Yajnavalkya) says :—

"Verse 53: 'After the fifth ancestor on the mother's and after the seventh on the father's side.' On the mother's side in the mother's line after the fifth, on the father's side in the father's line, after the seventh (ancestor), the sapindaship ceases, these latter two words must be understood, and therefore the word sapinda, which on account of its etymological import (connected by having in common particles of one body) would apply to all men, is restricted in designation, just as the word pankaja (which etymologically means 'growing in the mud' and therefore would apply to all plants growing in the mud, designates the lotus only) and the like, and thus the six descendants, beginning with the son, and one's self (counted as the seventh in each case) are sapindas."

The rendering of the above passages by Pandit Rajkumar Sarvadhikari, though apparently more free, is certainly instructive and interesting, and deserves quotation as shewing what a learned Hindu scholar considered was in the mind of Vijnaneswara when using the word sapinda. "The Mitakshara then explains the following words in the next verse of Yajnavalkya, beyond the fifth and seventh degrees on the mother's side and the father's side respectively. It has been already explained, that the relation of sapinda exists by reason of the connection of

[1] West & Buhler, Vol. I, p. 121

the parts of the same body, both directly and indirectly. But such a relationship is possible everywhere in some way or other, between all men in this world, without a beginning. So the definition would be too wide. It is for this reason that the sage limits it thus, 'Beyond the fifth, etc.

"The meaning is 'on the mother's side' i.e., in the line of the mother, after the fifth degree; 'on the father's side' i.e., in the line of the father, after the seventh degree the relation of sapinda ceases.

'Although the word sapinda, therefore, may be applied in its etymological sense a most to all men it is there can be no doubt, limited in its signification to certain definite individuals just as the word maid-born is applied only to a lotus.

"Thus the father and the other ascendants are six sapindas and the son and the other descendants are six and the man himself is the seventh. In case of the division of a line also, the enumeration should be made until the seventh degree, commencing from whence the direct one of the line changes. This rule should be applied in every case."[1]

Their Lordships have no manner of doubt that in the passages quoted above Vijnaneswara was laying down rules for the limitation of sapinda-relationship generally.

It has been suggested in argument that this limitation is with regard to marriage only, that it defines the prohibited degrees within which a man cannot marry. A similar contention was put forward in *Lallubhai Hargovan* v. *Manekbai*[2]. The observations on this point of the learned judges one of whom was the distinguished jurist West J. (co-author of the Digest, and afterwards Sir Raymond West) appear to their Lordships as extremely apposite to the present case.

Westropp C. J. in that case at p. 470 said as follows: "It has been contended for the plaintiffs that in the above extracts from the Acharakanda and the Sanskara Mayukha the respective authors were dealing with sapinda relationship in its ceremonial aspect only, and that when they wrote upon sapinda relationship with reference to inheritance they may be regarded as viewing

[1] Sarvadhikari's Tagore Law Lectures, 1880, pp. 660 to 664.

[2] I. L. R. 2 Bom. 365.

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expounds reasonably on the same lines as the author of the Daya-bhaga and certain other commentators on Hindu Law. But we think that the burden rests upon the plaintiffs to show that Apastamba and Nilakantha regarded sapinda-relationship as resting on a different basis for the purpose of succession from that on which, demonstrably perhaps but most probably, the one has placed it in the Acharakanda and the other in the Smriti-kaustubha. We do not think that the learned counsel for the plaintiffs have given any good reason for assuming that the authors intended to make any such difference, nor is it likely that they did.

"The religious and ceremonial law of the Hindus as prevailing amongst castes, or in particular localities, is, generally speaking, almost inseparably blended with their law of succession in the same castes or localities, an opposite condition being exceptional."

As a matter of fact, as Messrs. West and Bühler point out, Apastamba expressly says 'wherever the word sapinda is used there exists (between the persons to whom it is applicable) a connection with one body either immediately or by descent.'

In [illegible] the learned Judges of the Full Bench, one of whom was a Hindu pandit of great eminence, express themselves on this point in the following terms:—'Having taken great pains to accurately define the word sapinda in the beginning of his work and having said in clear words in the passage in question that one ought to know that wherever the word sapinda is used there exists (between the persons to whom it is applied) a connection with one body either immediately or by descent, it is hardly reasonable to suppose that the author used the word in another part of the same work in a different sense. It is a well understood rule of construction amongst the authors of the Institutes of Hindu Law, that the same word must be taken to have been used in one and the same sense throughout a work unless the contrary is expressly indicated."

Nor have the learned counsel for the appellants been in a position in this case to refer to any authority excepting one,

* I. L. R. 6 Calc. 119, at p. 126.

which their Lordships will hereafter refer in support of their proposition that the limitations of Vyavahara or sapinda relationship are confined to marriage impediments and exogamal rites, and do not relate to inheritance.

The Law of Inheritance in the Mitakshara is treated by Mr Colebrooke as in book II, and forms chapter VI of that part of the work. It is entitled "Law of Inheritance" or "partition of heritage." It is unnecessary to refer to chapter I of Mr Colebrooke's translation or to the earlier sections of chapter II, as they deal with subjects which do not come within the purview of this judgment. It is with Sections V, VI and VII of chapter II that their Lordships are principally concerned. The rendering of the word sapindas as "cognates" selected by learned Pandits throughout Mr Colebrooke's translation. His arrangement of the matter is also different from the original where the subject of inheritance appears to belong with the general law as in chapter VI.

Mr Colebrooke has split it up into two chapters divided into sections. This circumstance is noticed in the Bombay judgment. Chapter II, section VI, of Mr Colebrooke's translation deals with the succession of the gotraja or failure of "brother's sons." Although gotraja is explained by the term gentiles borrowed from the Roman system, to which no doubt the Hindu system has a remarkable analogy, it would be more convenient to adhere to the definition given in the Mitakshara itself. Omitting the English equivalents introduced into the translation, and retaining the Sanskrit expressions, the paragraphs run as follows:

"1. On failure of the paternal grandfather gotraja sapindas, namely the paternal grandfather and the rest, inherit the estate. For Bhauma gotra sapindas are indicated by the term bandhu.

"2. Here, on failure of the father's descendants, the heirs are successively the paternal grandfather, the paternal great-grandfather, the uncles and their sons.

"3. On failure of the paternal grandfather or the paternal great-grandfather, the great-grandfather, his sons and their issue, inherit. In this manner must be understood the succession of the samanodaka sapindas.

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"6. If there be none such, the succession devolves on sapindakas and thus must be understood to reach the seven degrees beyond sapindas, or else as far as the limit of knowledge and name extend." Accordingly what Manu says, 'The relation of the sapindas ceases with the seventh person, and that of samanodakas extends to the fourteenth degree, or, as some affirm, it reaches as far as the memory of birth and name extends. This is signified by gotra.'"

Their Lordships have preferred to adopt for the purposes of this judgment the translation which was before this Board in *Lallubhai's Case*.[4]

It is to be observed that the rule in paragraph 3 is thus stated in the Vyavaharadhyaya:[5] "On failure of the paternal grandmother, the paternal grandfather and the other sapindas of the same gotra are heirs; since the sapindas or persons connected through the pinda or body of a different gotra are included under terms the bandhu or 'cognates.'"

The earliest expounders appear sometimes to have used the term bandhu to signify a sapinda without any idea of including cognates. This is clear from a passage of the Vyavaharadhyaya, where, after quoting the rule as to the succession of collaterals given by Vishnu who places the bandhus immediately after he (Katyayana) says as follows: "Here the term bandhu (kinsman) signifies a sapinda, and the term sakulya (distant kinsman) means a sagotra, or one descended from a common ancestor in the male line rather than a sapinda. If by the term bandhu the cognates of the father were comprised, then there would be a conflict with the order mentioned by Jagiswara, the Contemplative Saint (*i.e.*, Yajnavalkya). Yajnavalkya himself employs the expression indiscriminately in various places to signify connections and friends. But in chapter III of his Dharmasastra he himself introduces bandhus as acquiring a heritable right on failure of the gotraja." The passage in Rao Venkvanath Mandlik's translation[6] is as follows —"The wife, daughters, both parents, brothers, and likewise their sons,

[4] I. L. R. 2 Bom. 388, at p. 421.
[5] Sastri Sarkar's Translation, (Calcutta, 1870), p. 160.
[6] Sastri Sarkar's Translation, p. 142.
[7] Mandlik's Hindu Law (Bombay, 1880), p. 220.

gotraja sapindas, bandhus, cognates, a pupil and a fellow-student. Of these on failure of the preceding, the next following in order is heir to the estate of one who has departed for heaven leaving no gotraja lineal male descendants."

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Learned counsel for the respondents urges that this inclusion of bandhus or cognates forces a marked extension of the right of inheritance to people who until then were not regarded as heirs, and he contends that it is hardly likely that so remarkable a change should have been made without any limitation, considering that the sapinda-relationship was subject to a limit.

To determine how far this contention is well founded, it is necessary to examine a little more closely the doctrines of the Mitakshara relating to the succession of collaterals. Vijnaneswara in reality seems to have shaped the rules which govern this branch of the law of inheritance in force in the Benares school. In s. 5 (1) (Gharpure's Translation), in describing the gotrasapindas or consanguineous relations sprung from the same stock, he emphasizes the fact of their being members of the same family by the specific statement that the sapindas belonging to a different family (gotra)—the bhinna-gotra—are included under the designation of bandhus. This is clearly borne out by the passage of the Viramitrodaya already referred to. Henceforth the word bandhu, therefore, has, in the system of the Mitakshara, a distinctive and technical meaning, in other words it signifies the bhinna-gotra sapindas.

In paragraph 5 for the word gotraja-sapinda is substituted the more definite term of samana-gotra sapinda. With regard to this West and Buhler[1] observe that "The substitution of samana-gotra for gotraja, as well as the employment of bhinna-gotra to designate the opposite of the term, both show that Vijnaneswara took gotraja in the sense of belonging to the same family." Commenting on the passage relating to the succession of the gotraja sapinda, the Viramitrodaya, which is regarded as one of the most important commentaries on the Mitakshara, says "similarly to the seventh (degree) the sapindas of the same gotra take the estate of a person without male issue."[2]

[1] 3rd ed., Vol. 1, p. 129.
[2] Sastri Sarkar's Translation, p. 100.

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The limitation of the seventh degree appears in Yajnavalkya's Institutes, chapter I, verses 52, 53, in these words: "He who has not lost his chastity, let him marry a girl who is not a sapinda of his mother, who is descended from one whose gotra and pravara are different from his, and who is removed five degrees on the mother's and seven on the father's side." The comment of Vijnaneswara on this text of Yajnavalkya has already been given in extenso in a previous part of this judgment, but the following lines may be quoted again with advantage: "On the mother's side in the mother's line after the fifth; on the father's side, in the father's line, after the seventh (ancestor) the sapinda-relationship ceases."[1]

The translation by Sastri Todapchandra Sarkar[2] of the passage in which these words occur is important, as he is the authority on whose expositions the appellants chiefly rely. It runs thus: "While explaining the term non-sapinda, the sapinda-relationship is stated to be directly or mediately through connection with one body; but that relationship of all persons may, in one way or other, be traced with all other persons in this world (Eternal transmigrations of the soul with its minute body, and so it would include persons that are not intended to be included, hence it is ordained —' and is beyond the fifth and seventh from the mother and from the father respectively)." The purport is that sapinda relationship ceases beyond the fifth from the mother, *i.e.*, in the mother's line and beyond the seventh from the father, *i.e.*, in the father's line."

It is quite clear, therefore that the limitation of the seventh degree with regard to the samana gotra sapindas given by Mitra Misra in the Viramitrodaya is taken from the rule enunciated by Vijnaneswara on Yajnavalkya in the Achara-kanda in respect of the cessation of sapinda-relationship.

Now, a bhinna-gotra sapinda is a bandhu according to Vijnaneswara. The classification contained in chapter II, s. 6 (Colebrooke's Translation), shows clearly who the bandhus are whom Vijnaneswara treats as bhinna-gotra sapindas entitled to

[1] Mandlik's Translation (Bombay, 1880), p. 107.

[2] West and Buhler 2nd ed. Vol. I, p. 121; Mayne's Hindu Law (7th ed.), p. 601, para 518.

[3] Hindu Law, p. 54.

"succession on failure of the gotrajas. The passage as translated by Mr Colebrooke runs thus: "1. On failure of gentiles, the cognates are heirs. Cognates are of three kinds, related to the person himself, to his father, or to his mother, as is declared by the following text: 'The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle, must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle must be reckoned his mother's cognate kindred.'

"2. Here, by reason of near affinity, the cognate kindred of the deceased himself are his successors in the first instance, on failure of them, his father's cognate kindred; or if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended."

Here Mr Colebrooke renders the word gotraja not gentiles, and handles into cognates. He also paraphrases the three classes under which Vijnaneswara groups the technical bandhus, namely, the atma bandhus, the pitri bandhus and the matri bandhus, as "cognates related to the person himself, to his father, or to his mother."

Their Lordships have little doubt, reading these passages by the light of the comments in the Viramitrodaya,[1] that Vijnaneswara was using the term bandhu in a restricted and technical sense, as implying a relation belonging to a different family but united by sapindaship-relationship. In fact he expressly says in chapter II, s. 5 (3).

It is not disputed that the plaintiffs do not come within the three categories mentioned above. But it is urged on the authority of *Narendra Lall Roy's Record*[2] that the enumeration is not exhaustive but merely illustrative.

In that case the question for decision was whether a maternal uncle not being specially included in the enumeration

[1] Sastri Sarkar's Translation p. 211.

[2] 12 Moo. Ind. Ap. 448.

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of bandhus in the Mitakshara was excluded from succession. Answering that question in the negative, and holding that although not expressly mentioned he was entitled to succeed as a bandhu, this Board observed that the text did not purport to be an exhaustive enumeration of all bandhus "who are capable of inheriting" nor was it cited as such for that purpose by the author, and that it was used simply as a proof or illustration of his proposition that there are three kinds or classes of bandhus. These remarks hardly warrant the contention which is attempted to be based on them that the classes specified by Vijnaneswara can be added to.

In the present case, however, it does not seem necessary to their Lordships to enter upon the determination of the question whether the classes can be extended, for the point at issue can be decided on other grounds.

The limitation of five degrees of sapindas, and can only apply to the bhinnagotra sapindas. But it is contended that this limitation is confined to prohibition in respect of marriage. As has already been observed part of the limitation appears to have been applied to the succession of sapindas, and their Lordships are unable to see on what principle it can be said that the other part relating to kinsmen who are equally sapindas but belong to a different gotra or gotras must be restricted to matrimonial affinity.

Considerable reliance has been placed on the statement of the law by Sastri Sadashiva Bandya Sathe in his work on Hindu Law. Great respect is due to the opinions of that learned lawyer. But it seems to their Lordships that their weight is considerably discounted by his having, in order to prevent the deceased's property becoming ownerless and thus escheating to the Crown, to bring in the caste people of the deceased also as bandhus, and the somewhat uncertain note of his conclusion, where he says at p. 74: "The conclusion, therefore, which appears to legitimately follow from the foregoing consideration, is, that the word bandhu in the Mitakshara means and includes either all cognate relations without any restriction or at any rate, all cognates within seven degrees on both the father's as well as on the mother's side."

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Again, his attempt to widen the signification of the word sapinda by employing the English equivalent of relation does not seem to be supported by the definition of sapinda-relationship in the Mitakshara itself.

Reference has also been made to certain passages in Rao Vishwanath Mandlik's valuable work, in which he says that the sapinda-relationship for inheritance is not always the same as for marriage or impurity (arising from birth or death). That may or may not be, but in one part of his work to which the Judicial Commissioner has referred in his judgment the learned translator of Yajnavalkya Smriti says that sapinda connection in general is "co-extensive with that for marriage purposes." Nor in this connection, their Lordships think, can the following passage in the Viramitrodaya be overlooked: "And the text, 'The sapinda-relationship, however, ceases on the seventh generation,' is to be explained consistently with the text of Yajnavalkya namely 'after the fifth and the seventh from the mother and the father respectively,' to mean that it remains in the seventh but ceases in the eighth generation. Hence, as in the case of the unmarried female the sapinda-relationship extending over three generations, as is declared in the characteristic property enjoyed by wealth, etc., is ascertained to be with reference to that alone, so it is to be learned that the sapinda-relationship (extending to the fourth degree) is relative to succession alone."[1]

In the absence of any authoritative text their Lordships do not see their way merely on abstract reasoning to lay down a view of the law which has received the recognition of the Courts in India and which the District Judge, an officer of great experience and learning, says is accepted by "public opinion." As has already been observed, the right of inheritance is founded on sapinda-relationship, which, under the Mitakshara, means consanguinity in a restricted legal sense of any explained by the author. That bond comes to an end with the fifth degree when the heir is through a female. It seems difficult to conceive that the right to inherit should continue after the relationship on which it is founded, and which gives it birth, has come to an end.

[1] Sastri Sarkar's Translation, pp. 156 and 157.

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In the case of *Lowji Nakhda* v. *Lakha Gauji*[1] one of the tests employed for determining whether the defendant in that case was a sapinda of the propositus was the mutuality of sapinda relationship. The doctrine of mutuality is based on the rule as enunciated by Manu and is fully explained by Rajkumar Sarvadhikari in his Lectures at p. 640. Another well known Hindu writer of the present day speaks thus of the above rule: "It is to be observed here that the wealth of a sapinda is taken by his nearest sapinda, according to the well known text of Manu. From that text it follows that the relation of sapindaship must be mutual. Among agnates the relation of sapindaship is always mutual, but among cognates it is not so in a few cases. In order to determine whether any persons are heritable cognates of the propositus it is necessary to see whether they are related as sapindas to each other. *Lowji Nakhda* v. *Lakha Gauji*[1] 'Unless sapindaship is mutual one cannot be the heir of the other."[2]

In *Hafiz Isa* v. *Yusuf Rao*[3] the rule of the Mitakshara commentators on the Acharam kinds relative to sapinda relationship in respect of marriage is assumed as applicable to inheritance. In fact the judgment proceeds on that basis and the order of sapinda relationship with its limitations in Rajkumar Sarvadhikari's Tagore Law Lectures is accepted as representing a correct exposition of the Mitakshara law. The doctrine of mutuality is also explained in clear terms. "Again a sapinda of the propositus to be capable of inheriting must satisfy a further condition, namely, that he must be so related to the propositus, that the propositus is also a sapinda of him either directly or through the father or the mother. This mutuality of sapinda-relationship between the propositus and his heritable sapindas is assumed as a necessary condition in the case of *Lowji Nakhda*[4] v. *Lakha Gauji*,[1] and the authority for this is to be found in the text of Manu (chapter IX, 187) cited in the Mitakshara, chapter II, s. 5 (3) as interpreted by Kulluk Bhatta and Nareswara Bhatta, the two leading commentators on the Mitakshara.

[1] I. L. R. Cals. 218.
[2] Commentary on Hindu Law by J. C. Bhattacharyya, p. 456.
[4] I. L. R. 22 Cals.

The text according to these commentators means this, the property of a near sapinda shall be that of a near sapinda from this it is clear that a man in order to be a heritable sapinda of the propositus must be so related to him that they are sapindas of each other."

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These two decisions of the Calcutta High Court have been challenged on the ground that they represent Dayabhaga views rather than the doctrines of the Mitakshara. To their Lordships the objection seems hypothetical and without any basis excepting the criticisms of Kalachandra Sastri. One of the learned judges who decided *Kory Lall's Case*[1] was the distinguished judge and erudite Sanskrit scholar Mr. Justice Gurusadas Banerjee who was not likely to allow his mind to be confused by Dayabhaga conceptions in determining a case under the Mitakshara Law.

The general conclusion to which a close examination of the authorities leads their Lordships may be briefly stated as follows: (a) that the sapinda relationship which the heritable right of collaterals is founded rests in the case of the bhinna gotra sapinda with the fifth degree from the common ancestor; (b) that in order to entitle a man to succeed to the inheritance of another he must be so related to the latter that they are sapindas of each other, which is only a paraphrase of Manu's rule.

In the present case the plaintiffs are Lakshman Rao's paternal grandfather's son's son's daughter's daughter's sons. They are his bhinna gotra beyond the fifth degree, and as the District Judge points out, the element of mutuality is wanting between them and Lakshman Rao.

Two considerations were strongly pressed on behalf of the appellants to induce their Lordships to extend the application of the sapinda-relation in the case of bandhus beyond the fifth degree mentioned in the Mitakshara. It was urged that it is hardly likely Vijnaneswara would give a right of inheritance to a spiritual preceptor or guru before kinsmen however remotely connected. This argument appears to ignore the peculiar and intimate relationship which their Lordships understand

[1] I. L. R. 32 Calc. 329.

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exists in the Hindu system between the pupil and the guru who has to initiate him into the mysteries of the Vedic laws and rites, and under whose roof he has to pass many years of his life. It is easy to suppose that in such circumstances the mystical relationship between a spiritual preceptor and a pupil should be regarded as creating a far closer tie than remote relationship of blood.

As regards the other consideration which is based on the possibility of the Crown becoming a claimant in the presence of remote bhinna gotra, their Lordships need only observe that, whether such a claim would be justified or even be likely to be advanced, it does not seem necessary to express an opinion in the present case.

Here the defendant is in possession of Lakshman Rao's estate claiming as heir to his wife, Lakshman Rao's daughter. The plaintiffs' suit is an action in ejectment, and they must, in order to succeed, strictly prove their title.

It is a matter of satisfaction to their Lordships that they find themselves in complete agreement with the learned judges in the Courts below. The District Judge is himself a Hindu, versed in Sanskrit, and has examined the authorities in original. His decision is entitled to great weight and consideration.

Their Lordships are of opinion that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

The appellants must pay the costs of this appeal.

Note.—In leading cases are drawn two important limitations under which bandhus are held to the property under the Mitakshara Law, viz., that the sapindas entitled to inherit are only those who come within the definition of that term in the Achara kanda of the Mitakshara and (another) in order to entitle a man to succeed to the inheritance of another he must be so related to the latter that they are Sagotrija to each other. The first of these is well established (in Case of Bakaba v. Collector of Surat (1880) I. L. R., 6 Bom. 110 and in Bala Lal v. Nanda Lal (1904) I. L. R. 32 Calc. 339) the second rule is considered to follow almost as a matter of course from Manu Ch. IX, 187, as interpreted by Vijnaneswara and Bala Bhatta. Under the definition of sapinda, as given in the Achara kanda, the number of male cognate agnatas will be 1150. By the application of the theory laid down in the case the number of female bandhus will be reduced to 382. By the introduction of further limitation that if a person who is a bandhu through his mother is not a heritable bandhu, he can cannot be one either, though he is within seven degrees of the propositus, the number will be further reduced to about 230.

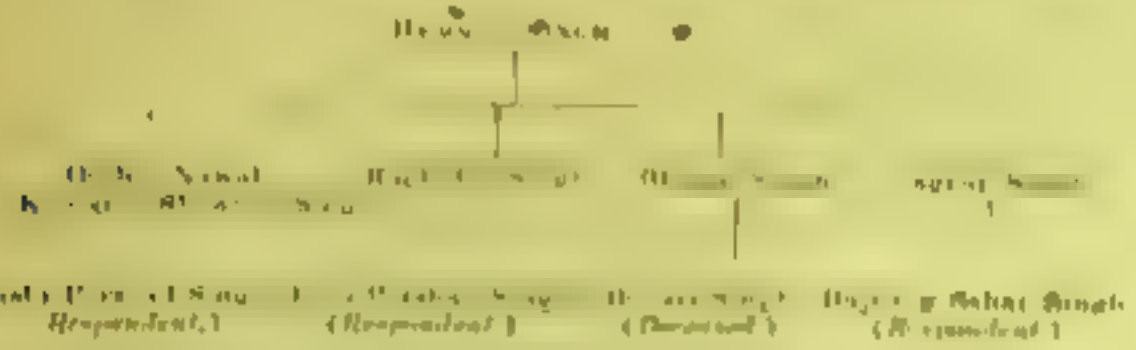
17

HARI KISHEN BHAGAT

KASHI PERSHAD SINGH

[... I. L. R. 12 ... S. C. L. J. ... I. L. R. 12 I. A. 61 ... 21 W. R. 285 P.C.]

The facts of the case were that Shyamal Singh was the owner of a 6 pie share in Mauza Kotara together with a number of five-sixteenths with kamat rights of the subject-matter of the two suits which gave rise to the appeal. He died in 1812 leaving Dalbir Nawab Kunwar his widow and sole heiress who succeeded to his estate. The pedigree of his family so far as now material was as follows :—



On 26th November 1877 Dalbir Nawab Kunwar mortgaged 1, 2 and 3 of the properties in suit to Hari Kishen Bhagat for Rs. 950. The mortgage was witnessed by Raghubir Singh who was at that time the sole reversionary heir of Shyama Singh, and by Bolaki Singh, and was executed on behalf of the widow, the mortgagor, by the respondent Bajrang Sahai Singh.

On 11th July, 1882 the widow mortgaged 1 and 2 of the properties in suit to Hari Kishen Bhagat to secure a further loan of Rs. 1,775. And on 16th July 1883 she executed a zarpeshgi lease to Hari Kishen in respect of properties 2, 3 and 5 of the properties in suit for eleven years in consideration of an advance of Rs. 1,250.

On 8th May 1893 Hari Kishen Bhagat brought a suit on the mortgage of 26th November 1877 against Dalbir Nawab Kunwar in which on 19th July 1894 he obtained a decree under

* Present: Lord Davey, Lord Shand, Sir John Edge and Mr. Ameer Ali.

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which he brought properties 1, 2 and 4 to sale and purchased them on 12th February, 1894 for Rs. 1,550 and on 19th February, 1897 he brought a second suit on the mortgage of 11th July, 1884, obtained a decree on 2nd March, 1897, under which on 14th September 1897 he brought to sale properties 4 and 5 and purchased them for Rs. 2,050. Both these suits were brought in the Court of the Subordinate Judge of Monghyr, they were both undefended, and none of the reversioners were parties to them.

Dulan Nawab Kunwar died in 1901 and on 14th and 16th December 1901 respectively the present suits were filed the former by the respondent Bajrang Sahai Singh for a one-third share of the properties, and the other by the respondents Kashi Pershad Singh and Ram Pershad Singh, sons of Raghubir Singh for a two third share. The defendants in the former suit Hari Kishen Bhagat (the first appellant) and his two sons Kishen Bhagat and Mahabir Bhagat, Kashi Pershad Singh, and Ram Pershad Singh as the persons enjoying the other two-thirds of the properties and the zemindar Raja Ram Narain Singh as the superior landlord and the defendants in the latter suit were the appellants, Bajrang Sahai Singh, and the said zemindar.

The plaintiffs claimed as the reversionary heirs of Shivanal Singh on the death of Dulan Nawab Kunwar and they alleged in their plaints that the mortgages and other transactions by her were not executed for legal necessity, and that the purchases by Hari Kishen Bhagat, therefore conveyed to him only a life interest in the properties in suit which was determined on the widow's death.

The defence set up by Hari Kishen Singh in each case was that the loans and advances taken by the widow (the mortgagor) were for legal and valid necessities and that the transactions had been entered into by her with the knowledge, approval and consent of the then reversionary heirs of Shivanal Singh, he claimed therefore that he had acquired an absolute estate in the properties and that the money covered by the zurpeshgi lease was still due and unpaid.

The judgment of their Lordships was delivered by

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Mr. Ashton Kc. The question for determination in these appeals relates to the validity, as against the reversioners, of certain sales of land in execution of decrees obtained on mortgages effected by a Hindu widow who had succeeded to her husband's estate on his death without leaving any issue. Shyamal Singh, the husband, died in 1871 and the widow, Bulbir Nawab Kuman held the properties which form the subject of the present litigation until the transactions the validity of which is challenged in these suits.

The first mortgage was executed by Nawab Kuman in favour of the defendant appellant on the 2nd of November 1877 in respect of three of the properties in her possession. On the 14th of July, 1882 she mortgaged the rest of the properties to Bhagat for a further loan and in 1883 she gave him what is usually called in India a [illegible] of the shares of Shyamal Singh in all the mouzahs save one. In the ordinary course the defendant obtained possession of the shares conveyed by it.

In 1894 Bhagat brought a suit against Nawab Kuman on the mortgage of 1877 and in execution of the decree on that bond purchased the three properties comprised related. In 1897 he obtained a decree on the bond of 1883 in execution of which he himself purchased again the remaining properties held by the widow. He then obtained possession of all the shares in the different villages which Nawab Kuman had inherited from her husband for a widow's estate.

Nawab Kuman died in 1909, and the plaintiffs who are Shyamal Singh's brothers sue and whose case is their right to his estate, though questioned in the first Court is not disputed now, brought the present suits to recover possession of the property held by Bhagat under the execution sales of 1893 and 1897, the main contention being that neither the mortgages executed by Nawab Kuman nor the sales thereunder affected more than her interest which ceased on her death.

Hari Kishen Bhagat is the principal defendant, but his sons have been added as parties as they are said to be interested and leaving in connexion with it, and are therefore, necessary parties.

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The main defence to the plaintiffs' claims was that the mortgages were effected by the widow for valid and legal necessities under the Hindu law and, further, that they were consented to by the reversioners and that consequently the defendants by virtue of the sales in question acquired the interests of the widow as well as reversioners. It is to be remembered that in neither of the mortgage suits were the reversioners made parties.

At the time when the bond of 1877 was executed the nearest reversioner to Shivanal Singh was his wife's surviving brother Raghubar Singh. After him stood Raghubar's sons, of whom there were several, and the sons of two other brothers—Bhupal and Jagrup—who were dead at the time. Among these nephews of Shivanal Singh the names of Beharı, the only son of Bhupal and of Bajrang Sahai, a son of Jagrup and a plaintiff in one of the present suits, should be noted as they appear in the transactions in question.

In the instrument of 1877 the name of the witness is written by Bajrang Sahai Singh. He was appointed to purchase the stamp paper on which the bond is inscribed. Among the witnesses to the document are Raghubar and Beharı.

The name of the widow in the mortgage of 1882 appears to be written by Beharı Singh and one of the witnesses to it is Rai Bajrang Sahai. On the case of 1888 Nawab Kunwari's name is written by Mohammad, a son of Raghubar, and the witnesses are Ram Parshad, another son of Raghubar, Beharı Parshad, one of the sons of Beharı and Bajrang Sahai, who also appears to have attested the lady's signature. Both the Courts in India have found that as the [illegible] of 1888 is concerned, the debt contracted thereunder has been satisfied out of the usufruct of the properties covered by the lease.

The points for determination as to these appeals depend on the transactions of 1882 and 1888 respectively. The law relating to the dealings of a Hindu widow with her husband's estate which devolves on her in default of issue is now too well settled to need any prolonged consideration. To be valid as against the reversioners an [illegible] must [illegible]

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a charge created by a Hindu widow for a purpose not affected by necessity, provided the lender had no reason to think that such debt was contracted without consideration and for valid and legal necessity, and in the course of establishing such necessity rests heavily on the person who claims the benefit of transactions with a Hindu widow or other female taking limited estates. The requirement of the law may however be fulfilled by proving the existence of circumstances from which the necessity arose in the transactions.

In the present case the Trial Judge in a carefully and well considered judgment held that the defendants had failed to prove any valid and legal necessity for the mortgages executed by the widow. His view was upheld on appeal by the High Court of Calcutta and there being thus a concurrent finding of fact by the two Courts in India, that subject is now out of the region of discussion. Both the Courts have further held in effect that the part taken by the reversioners with respect to the terms of the mortgages did not amount to a consent to bind their interests. In view of the facts and circumstances of the case, those Judges were not justified in expressing their concurrence with the conclusions at which the Courts in India have arrived. The Trial Judge has examined the phraseology of the [illegible] and has found that there is nothing in that phraseology inconsistent with the fact that the interest of the reversioners was intended to be charged. Nor is there anything to show that the reversioners were induced by the terms understood in other respects to refrain from asserting that they benefited from the transactions or that so far as they were concerned there was no necessity for the mortgages. Their Lordships think that [illegible] Lord Hobhouse in *Jewun Singh* v. *Mt. [illegible]* [illegible] must be established by positive evidence that there was a full and adequate understanding of the nature of the dealings [illegible] binding their interests and that such consent cannot be inferred [illegible] restraint [illegible]

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In *Ray Lukhee Debia v. Gokool Chunder Chowdry*[1] this Board refused to affirm the proposition that mere attestation by a relative necessarily imports consent, and they added that when the consent of the husband's kindred is relied upon for the validity of alienations effected by the widow "the kindred in such case must generally mean all those who are likely to be interested in disputing the transaction. At all events there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and one justified by Hindu law." The observations of the Board in that case seem to their Lordships to apply with particular force to the facts of the present case.

On the whole, their Lordships are of opinion that the Judgments appealed from are right and ought to be affirmed, and that these appeals ought to be dismissed with costs. And they will humbly advise His Majesty accordingly.

Appeals dismissed.

Solicitors: Whose name should be a household word with polished pieces of aluminium to be called on question the question should be consideration as whether the purpose for which the alienation was made was proper or legitimate. In the matter of Mussumat [illegible] Tucker [illegible] 1 A. [illegible] p. 360. Turner [illegible] and [illegible] a husband would be [illegible] and if there be collateral heirs of the husband [illegible] widow's consent of her own will about the property [illegible] [illegible] Bhagwan [illegible] [illegible] purposes or those which were supposed to confer [illegible] upon the welfare of the husband, she has a larger power of alienation than that which he possesses for purely worldly purposes. To support an alienation for the last she must show necessity. On the other hand it may be taken as established that an alienation by her which would not otherwise be binding upon the reversioner may be made valid by the consent of the husband's kindred. But it is only when the consent of the husband's kindred is such that the alienation is for the benefit of the husband's estate that the alienation is binding upon the reversioner. The question of fact as to whether that consent is given, the purpose for which the alienation is to be made must be proved. Whether the particular purpose is proper or not must depend on the circumstances of the case. For [illegible] [illegible] [illegible] [illegible] See *Jay Lukhee v.* (1) L.R. 13 Moo. I. A. 209. Shamsunnissa v. Ali [illegible] [illegible] I. A. 1st [illegible] 21 W. R. 71 and *Bhagwan Singh v. Gendan Singh* (1) [illegible] I. L. R. 41 Calc. 783. In the last mentioned case it was held that the sanction by reversioners to a sale of an alienation property by a Hindu

(1) (1889) 13 Moo. I. A. 209, 228.

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Singh

woman offended ... [illegible] ... Bindeshri, 32 C.L.J. 473 at pp. 474, 475.

Though mere attempt ... [illegible] ... 452 at p. 470.

The validity of the charge ... [illegible] ... 731 F.N.

18.

Before Sir [illegible] H. Wilson, Acting Chief Justice
Mr. Justice Macpherson and Mr. Justice Hammond

MANIKYAMALA BOSE

v.

NANDA KUMAR BOSE

[illegible] I. L. R. 10 Cal. 1200, L. R. I. A. 201
11 C. W. N. 121

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August 20

Appeal by the defendants.

The facts of the case material to this report were these: Chandra Kumar Bose, brother of the plaintiff died on the 9th Bhadra 1288 corresponding to the 24th August 1881 leaving his widow Manikyamala the first defendant and an adopted son Akhoy. He also left a will executed on the day of his death by which he made certain dispositions of his property and authorised his widow to take three sons successively in adoption one after the death of another. Akhoy died on the 13th Magh 1290 corresponding to the 25th January 1884 after having attained his majority, leaving a childless widow Bolhumukhi who died in Srabon 1291 corresponding to July 1884. Shortly afterwards on the 16th Bhadra 1291 corresponding to the 29th August 1884, Manikyamala adopted the second defendant according to the rites prescribed by the Hindu Shastras.

The Judgments of the Court were as follows:—

Macpherson C. J. I have had an opportunity of reading the judgment about to be delivered by Mr. Justice Mookerjee and I only desire to say that I entirely agree.

Mookerjee J. The facts which have given rise to the litigation, out of which the present appeal arises, are set out fully before us. One Chandra Kumar Bose the brother of the plaintiff respondent Nanda Kumar Bose died on the 24th August, 1881, leaving a widow Manikyamala the first defendant to this suit, and an adopted son Akhoy Kumar Bose. On the day of his death, Chandra Kumar executed a will by which he made a disposition of his properties and also authorised his widow to take three sons

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successively in adoption, one after the death of another. Akhoy Kumar attained his majority, married and died on the 24th January, 1894, leaving a widow Hiralal Mukh Bulbul Mukhi. Bulbul Mukhi died in July, 1898, and shortly after on the 28th August, Manmathanath, the widow of Chandra Kumar, took the second defendant Mohendra Chandra into adoption, professing to act in exercise of the power conferred upon her by the will of her husband. The plaintiff commenced his action on the 8th June, 1901 for a declaration that the adoption is invalid under the Hindu Law. The learned Subordinate Judge has made a decree in favour of the plaintiff declaring that the adoption of the second defendant by the first defendant is invalid. The defendants have appealed to this Court and on their behalf the validity of the adoption has been sought to be maintained upon two grounds, namely, *first* that upon a true construction of the will of Chandra Kumar the adopted son took a more or less interest followed by a gift over to the widow of Chandra Kumar upon failure of the same one of the adopted son, and consequently, the widow could divest her own estate by a second adoption, and *secondly* that as the adoption now in dispute was made after the death of the widow of the first adopted son, and at a time when the estate had ceased to be the widow of Chandra Kumar, there was nothing for the Hindu Law to invalidate the second adoption.

The decision of the first question must depend upon the construction of the provisions of the will of Chandra Kumar. The first paragraph of the will enjoins the widow to take there is no necessity to notice also the death of another. The second paragraph provides as follows:—

"My adopted son shall succeed to all [illegible] property, which I have [illegible] the death of [illegible] adoption of another son by my wife [illegible] [illegible] has adopted [illegible]

The third paragraph of the will provides [illegible] the estate during the minority of the adopted son [illegible] down that the estate is to be made over to him when he attains majority. The learned Vakil [illegible] the adopted son took a life interest [illegible] his death the estate did not pass to his widow [illegible]

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Manikyamala Dasi v. Nanda Kumar Bose

his adoptive mother. We are unable to accept this contention as well founded. Under section 91 of the Indian Succession Act, which was made applicable to Hindus by section 2 of the Hindu Wills Act "where property is bequeathed to any person, he is entitled to the whole interest therein of the testator, unless it appears from the will that only a restricted interest was intended for him." This is substantially the rule laid down by the Judicial Committee in *Jotindro Mohun Tagore v. Ganendro Mohun Tagore*,[1] where their Lordships observed that "if an estate were given to a man simply without express words of inheritance, it would, in the absence of a controlling context, carry by Hindu law (as under the present state of law, it does by will in England) an estate of inheritance." We feel no doubt that under the will of Chandra Kumar his adopted son took an absolute interest, subject to a condition of defeasance. The question, therefore, arises whether the executory gift over took effect in the present case. In view of section 111 of the Indian Succession Act, made applicable to Hindus by the Hindu Wills Act, 1870, and the decision of the Judicial Committee in *Nowabun Nissa v. Ameer Hossein Khan*,[2] we must hold, that the gift over did not take effect. Here a legacy is given to the widow of the testator, if a specified uncertain event, namely, the death of the adopted son of the testator, shall happen; no time is mentioned in the will for the occurrence of that event; the legacy cannot, therefore, take effect unless the specified uncertain event, namely, the death of the adopted son, happens before the period when the fund bequeathed is payable or distributable. There was some discussion at the Bar as to the precise period when the fund bequeathed is payable or distributable in this case; it was suggested, on the one hand, that the period in question is the death of the testator as laid down by the Judicial Committee in *Nowabun Nissa v. Ameer Hossein Khan*[2], it was argued, on the other hand, that the period of distribution is the time when the adopted son attains majority. It is immaterial for our present purposes which view is accepted, because the adopted son died, not only after the death of the testator, but

[1] (1872) L. R. 1 A. Sup. 47, 75; 14 W. R. (P. C.) 21.

[2] (1878) I. L. R. 2 Calc. 323; L. R. 5 I. A. 18.

[3] (1906) I. L. R. 33 Calc. 603; L. R. 33 I. A. 18, 27.

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also after he had attained majority. In either view, therefore, the gift over did not take effect. There is no foundation, therefore, for the suggestion made by the learned Vakil for the appellants, that the question raised before us is identical with that left open by the Judicial Committee in *Bhoobun Moyee Debia v. Ram Kishore Acharjee Chowdhry*[1] namely, the effect of a testamentary disposition by an adoptive father under which he restricts the interest of his adopted son in his estate to a life interest and limits it over to another adopted son of his own if the first adopted son leaves no issue male or such issue male fails. We must hold, accordingly, that upon the death of Chandra Kumar his estate vested absolutely in Akhoy Kumar, that upon the death of the latter it vested in his widow Bidhu Mukhi and that upon her death it reverted to Manikyamala as the heiress of her adopted son.

The second ground taken before us gives a question of some novelty which is not altogether free from difficulty. It is contended on behalf of the appellants that inasmuch as the second adoption was made after the death of the widow of the adopted son and at a time when the estate was vested in the widow of the original owner there was no bar to the second adoption as it would divest the estate of the adoptive mother alone. It has been conceded before us, and in view of the decision of the Judicial Committee in *Bhoobun Moyee v. Ram Kishore* and *Padma Kumari Dasi Chowdhrani v. Hurrish Chandra*[2] it could not possibly be disputed, that the adoption would have been invalid if it had been made during the lifetime of the widow of the adopted son; but it is urged that during such period the power of adoption was incapable of execution. The question, therefore, is reducible to this: Whether the power of adoption, vested in the widow of the original owner, which during the whole time of her daughter-in-law was incapable of execution, became exhausted upon the death of her adopted son when the estate vested in his widow or, whether such power of adoption merely remained in abeyance and was revived and became capable of execution upon the death of her daughter-in-law, when the estate reverted to her

[1] (1868) 10 Moo. I. A. 279, 311 [illegible]
[2] 3 W. R. P. C. 10 [illegible]
[3] (1881) I. L. R. 8 Calc. 302; L. R. 8 I. A. [illegible]

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Muthuramalinga Sivar v. Nanda Kumar Sivar

The solution of this question depends upon the principles deducible from a series of decisions of the Judicial Committee in which their Lordships had to consider the limits within which a power of adoption may be exercised by a Hindu widow.

The first case in which the question arose was that of *Bhubun Moyee Debia v. Ram Kishore Acharj Chowdhry*[1]. One Ram Kishore died leaving a son Bhabani and widow Chandrabatee, to whom he gave express authority to adopt in the event of his son's death. Bhabani married attained his majority and died leaving a widow but no issue. Chandrabatee then adopted a son Ram Kishore who sued Bhabani's widow Bhubun Moyee to recover the estate. The Judicial Committee held that her estate could not be divested by the subsequent adoption. Lord Kingsdown in delivering the judgment observed that although the deed of gift gave no express terms assigning a limit to the period within which the adoption might be made, it was plain that some limit must be assumed. It is uncontestable that the judgment is based upon the proposition of law that a widow's power of adoption is limited. The question is what are the limits to be assumed that are contained in the following passage from the judgment:—

"It might well have been that Bhabani had left a son, natural born or adopted, and that such son had died, himself leaving a son, and that such son had attained his majority at the late time of Chandrabatee it could hardly have been intended that after the lapse of several successive lives a son should be adopted to the great confusion of the last taker when all the spiritual purposes of a son according to the largest constructions of them would have been satisfied. But whatever may have been the intention would the law allow it to be effected. We rather understand the Judges below to have been of opinion, that if Bhabani Kishore had left a son or if a son had been lawfully adopted to him by his wife under a power legally conferred upon her, the power of adoption given to Chandrabatee would have been at an end. But although I see what reasons could be assigned for such a result which would not equally apply to the case before us."

[1] (1865) 10 Moo. I. A. 279, 3 W. R. P. C. 15.

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It is manifest from this passage that according to the Judicial Committee when he executed a will leaving a widow the power of adoption vested in the mother ceased to exist. No doubt the enlightened passages in their Lordships' judgment that the adopted son had lived to an age which enabled him to perform all the religious services which a son could perform for a father, and also, that the unlimited estate which the son had taken, having vested in his widow, a new heir could not be substituted by adoption so as to defeat that estate. These are, however, additional reasons in support of their Lordships' conclusion that the adoption was invalid and do not in any way weaken the effect of the reason first set forth. That this is the true view of the effect of the decision is proved conclusively by the case of *Pemm Kumari Debi Chowdhrani v. Court of Wards*,[1] which arose out of the same adoption. Ram Kishore got into possession of the property left by Gour Kishore after the death of Bhuban Moyee and died intestate. He was succeeded by a distant relation of Gour Kishore who would be entitled to succeed, if the adoption of Ram Kishore was invalid. The High Court held,—*Pemm Kumari Debi v. Juggut Kishore Acharjee*,[2]—that the Judicial Committee had not decided that the adoption was invalid, but only that by the adoption of Ram Kishore the estate vested in Bhuban Moyee was not divested which was also the view adopted in the case of *Kristo Soondur Dass v. Sreemutty Dossee*.[3] The case then went before the Privy Council, and the Judicial Committee negatived this view of the effect of their previous decision in *Pemm Kumari Debi Chowdhrani v. Court of Wards*.[1] Their Lordships pointed out that their [illegible] decision to be, that upon the vesting of the estate in the widow of Bhuban the [illegible] other person had the vesting of estate in the widow of Bhuban [illegible] the natural heir of his father [illegible] *a proper form*. This language is repeated and emphasized in their Lordships'

[1] (1881) I. L. R. 8 Calc. 302; L. R. 9 I. A. 229.

[2] (1870) I. L. R. 5 Calc. 815, 832, 843.

[3] (1874) 22 W. R. 121.

[4] (1881) 2 I. [illegible] 9 I. A. 229, 24

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their judgment in *Rajeswari v. Jawahir*,[1] where it was stated that the survival of the sons widow and the vesting of the estate in her *pro tanto* was to the right of her mother to adopt a son to her father. Their Lordships further expressed their entire concurrence in the view of the law laid down in *Pudma Kumari Debi Chowdhrani v. Court of Wards*[2] and with reference to the passage from that judgment already mentioned observed that "nothing can be clearer or more explicit than the language used by the Committee in that case." Substantially the same view was re-affirmed in *Jogo Chowdhrani v. Satish Chandra Mukerji*.[3] In view of these decisions of the Judicial Committee, it is impossible for us to uphold the contention of the appellants, that their Lordships intended merely to divert that the power of adoption vested in the mother did not come to an end, but remained suspended during the life time of the widow left by the son. The effect of the decision of the Judicial Committee was considered by the Bombay High Court in *Ananta v. Tambat Hanmant v. Sitaram Tambat Hanmant*,[4] and we agree in the view taken by the learned Judges who decided that case, the facts of which were very similar to those of the case before us. The question was further considered by a Full Bench of the Bombay High Court in *Jiva Ambaji v. Narmada*, in which Mr. Justice Chandavarkar after an elaborate review of the authorities observed that the language of the judgment in *Bhoobun Moyee's case* is so explicit that it is impossible to construe it otherwise than as meaning that there is a limit to the period within which a widow can exercise her power of adoption, and that once that limit is reached the power is at an end. The learned Judge expressed his concurrence with the view of Sir Charles Sargent in *Hanmant's case*[4] that the language of the Privy Council is altogether inconsistent with any idea of the right to adopt being merely suspended during the widow's life time, and contended that, where a Hindu dies leaving a widow and a son and that son dies leaving a widow, the power of adoption vested in the former widow was extinguished and could never

[1] (1887) I. L. R. 10 Mad. 346; L. R. 14 I. A. 67, 70.
[2] (1881) I. L. R. 8 Calc. 301; L. R. 8 I. A. 229.
[3] (1885) I. L. R. 12 Calc. 432; L. R. 12 I. A. 148.
[4] (1887) I. L. R. 12 Bom. 164.
[5] (1898) I. L. R. 23 Bom. 520.
[6] (1868) 10 Moo. I. A. 279; 3 W. R. P. C. 45.

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afterwards be reversed. The same view is indicated in the judgment of Mr. Ramsay in *Narayan Rayn* v. *Jeeny Ayeshee*[1] where that learned Judge observed, that a widow succeeding as heir to her son is competent to adopt only when that son has left neither widow nor issue. Upon a review, then, of the authorities, we must overrule the contention of the appellants, that the widow's death is the limit of time within which and the failure of male issue in the same line and the vesting of the estate in the widow are the only two conditions subject to which the power may be exercised, no matter whether the estate vests in the adopting widow just after the death of the son or after the death of the widow of the son.

The learned Vakil for the appellants placed considerable reliance upon the decisions of this Court in the cases of *Bykunt Nauee Koyal* v. *Ann Soondree Koyal*[2] and *Hurro Chunder Chuckerbutty* v. *Jugut Settanee Peary Annoora Debee*[3] and upon the decision of the Judicial Committee in *Annapurni Nachiarasi* v. *Padmanabha Venkatramana*[4]. In the first of these cases an adoption made under circumstances very similar to those of the present case was upheld by this Court. It does not appear to have been argued whether the fact that the adoption was made after the death of her daughter-in-law distinguished the case from that of *Ishwar Koer* v. *Hur Narain*[5]. But it appears to have been assumed that all that the Judicial Committee intended to decide was that the widow was competent to adopt if she invested the estate in no one but herself. That this was the prevailing view of the effect of the decision of the Judicial Committee is made clear by the cases of *Bama Sundari* v. *Sridhar*[6] and *Padmanabha Ammal* v. *Debee* v. *Jugut Kishore Acharya*[7]. That the view is erroneous we now know from the decision of the Judicial Committee in *Pedaya Ammal* v. *Ramasami Mudali*[8]. It follows inevitably that the decision in *Bykunt Nauee Koyal* v. *Ann Soondree*

[1] (1900) I. L. R. 25 Bom. 304, 310.
[2] (1867) 7 W. R. 302.
[3] (1880) I. L. R. 17 Calc. 616.
[4] (1906) 10 C. W. N. 921; 4 C. L. J. 171; since reported, I. L. R. 29 Mad. 302.
[5] (1885) 10 Mad. [illegible]; 8 W. R. P. C. [illegible]; [illegible]
[6] (1879) I. L. R. [illegible]
[7] (1881) I. L. R. 6 Calc. [illegible]; L. R. 8 I. A. [illegible]

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Bose[1] is inconsistent with the decisions of the Judicial Committee in *Pudmar Ammanee v. Court of Wards*[2] and *Thayeemal v. Lutchmeeparee*[3] and is therefore not binding on this Court. As regards the case of *Rama Chand v. Jugal Sett*[4] no doubt there are certain observations in the judgment, which may tend to lend some apparent support to the contention of the appellants, but the learned Judges seem to have recognised that according to the decision of the Judicial Committee in *Pudmar Ammanee v. Court of Wards*[2] the power of adoption is *de novo* and incapable of execution when the estate vests in the widow of the son, and they held this principle to be inapplicable to the case before them (which was that of a Jain widow) on the ground that no power from the husband was necessary to the validity of the adoption. As regards the recent decision of the Judicial Committee in *Annapoli Narayanamma v. Appalacharyulu*[5] it does not touch the question before us. It is argued however, that it has the effect of pro tanto weakening, if not actually overruling the earlier decisions of their Lordships in *Ishwar Dass v. Ram Autar*[6]. No doubt their Lordships quote with approval a passage from the judgment of Mr. Justice Mitter in *Ram Sundar Singh v. Sarnam Dass*, in which that learned Judge had held that an adopted son attaining an age of sufficient maturity and by performing the obsequies enjoined by the Shastras, cannot exhaust the whole of the spiritual benefit, which a son is capable of conferring upon the soul of his deceased father. This, no doubt, entirely takes against the view taken in the case of *Ishwar Dass v. Ram Autar*, to which their Lordships' attention does not appear to have been directed, namely, the view that all the spiritual purposes of a son may, under certain circumstances be taken to have been satisfied. But their Lordships do not dissent from the view that when the adopted son dies leaving a widow, the power of adoption given to the mother comes to an end. That their Lordships could not have intended to dissent from or throw

[1] (1887) I. L. R. [illegible]
[2] (1868) 12 M. I. A. 244; 4 C. L. J. 171; 1 L. R. 20 L. R. 10 I. A. 229
[3] (1887) I. L. R. 10 Mad. 302
[4] (1887) I. L. R. 15 Calc. 10
[5] 1892, 16 C. W. N. 97; L. R. 20 I. A. 229; 2 W. R. P. C. 15
[6] 1876, 22 W. R. 121

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Mantrymoola Rao

Nanda Kumar Rao

Note.—There is a limit on the general power which a male owner has power of adoption and that restricted limit is to... and that power is at an end. This power similarly comes to an end when on a the estate has vested in the heir at the moment and is not rendered void of the afterwards succeeds to the estate. The consent of the co-heir in whom the estate had vested, does not validate the adoption. Adoor Sangayalinga v. Nelumoothy, 1 L. R. 22 Mad. 220. See also the obiter dictum of Jenkins C. J. in Gopalakrishna v. Krishna, 1 L. R. 25 Bom. 611 at p. 615; 3 Bom. L. R. 454.

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The [illegible] was [illegible] 1908 for a [illegible] of the testator's will for a declaration that the trust for the establishment and [illegible] of the [illegible] and her worship [illegible] of the [illegible] and for an account and [illegible] of the defendants [illegible] and trustees. The [illegible] Chandra Maitra [illegible] under the will [illegible] Chandra [illegible] of the [illegible] of some of the [illegible] was [illegible] trustees.

The judgments of the Court were as follows:

JENKINS C. J. The questions referred for our determination are:—

(1) Does the principle of Hindu Law, which invalidates a gift other than to a sentient being capable of accepting it, apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death and make such a bequest void?

(2) Whether the cases of *Upendra Lal Boral* v. *Hemchandra Boral*[1], *Rajomoyee Dassee* v. *Troylukho Mohiney Dassee*[2] and *Nogendra Nandini Dassi* v. *Benoy Krishna Deb*[3], have been correctly decided, so far as they lay down the proposition that a gift to a Hindu deity, whose image is to be established and consecrated in future, is void?

The disposition which has led to this reference is contained in the will of Umesh Chandra Lahiri, and is in these terms:—

"(a) All my properties will be placed in the hands of Babu Ram Lal Maitra, son of late Ram Chandra Maitra of Pabna, and the grandsons of my father-in-law, Sriman Kali Prosanna Maitra, Sriman Chandra Maitra, Sriman Pratap Chandra Maitra, Sriman Abinash Chandra Maitra, as trustees. They shall according to the provisions made in para 6 pay to the persons mentioned in that para, their monthly allowances as fixed by me and shall defray the expenses for the performance of rites for the spiritual welfare of my mother, full sister and cousin (father's sister's daughter) and shall pay to my *[illegible]* Srijukta Harnath Bhattacharya of village Patasthali in the district of Burdwan Rs. 10 a [illegible] and to my *[illegible]* Srijukta Sarat Chandra Chakravarty of

1. (1897) I. L. R. 25 Calc. 405.
2. (1901) I. L. R. 29 Calc. 260.
3. (1902) I. L. R. 30 Calc. 521.

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Ram Lal Motan

It is necessary to observe the precise character of this provision. It does not purport to be a complete gift of property to an image to be consecrated as one to some extent the learned of the appellant's argument before us, but the testator directed all his property to be passed on the heads of persons named by him and subject to certain payments those persons were directed to erect the sculptured image which might be left to the choice and worship of Kasee after establishing the image of the Kalee after the name of the testator's mother. Now this manifestly was a bequest for religious purposes and such dispositions are favoured by Hindu law. Thus it is said by Katyayana: "If a gift be promised by a person whether in health or sickness for a religious purpose and he dies without making it his son should be compelled to make it. Of this there is no doubt" see Mandlik's Hindu Law, page 121. Again in the Chapter of the Mitakshara which deals with gifts it is said "whatever has been promised to any body for religious purposes should be given to him without fail" see Mitakshara, Vyavahara Adhyay, Part III, Chapter IV, section 11 (translated by the late Gorash Chandra Tarkalankar). "Property," it is said, "thus given by a man or appropriated (by him) to religious uses cannot be set aside by his son and the rest. The giver is competent to take care of the wealth or property endowed for religious purposes. He can no longer resume it, because *Dharma* is the then master or owner of such property. Let the owner himself or his representative, O Goddess! appropriate to pious purposes the corpus of a property or the income according as it may have been resolved." Mahanirvana Tantra, section 12, vs. 92—94. Other texts might be cited in support of this view, but it is unnecessary to elaborate the point.

And it is not in the texts alone that sanction is to be found for the view that dispositions for religious or charitable purposes are favoured: the leanings of the Courts too are in the same direction. Thus in the *Mayor of Lyons v. Advocate-General*, it was said: "Their Lordships are well aware that in passing these decrees they are sanctioning a proceeding for which there is no exact and complete precedent in the administration of charitable funds

(1921) L. R. 48 I. A. 172

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power was given by a testator to his wife to establish the name of an idol and by making a will in favour of it to manage the properties, construct a temple and perform the *shrâdha*.

In relation to those dispositions it was said "if there was a gift to the idol it was bad because there was no idol in existence at the time of his death." In the first place, it is this decision that has principally led to the present reference, so that it cannot be regarded as in itself an authority binding on us. Next it is to be noticed that the Privy Council Judges did not construe the aspect of the case which I have been discussing, but treated the disposition with which they were concerned, as though it were a simple gift to a not existent idol.

I have shown that the disposition with which we have to deal in this case is something different from that.

But apart from that I think we should not regard the decision in *Pyarey Lal v. Jai Gopal*[1], as affording any different reason for holding the direction now under consideration as invalid.

That decision purports to rest on the authority of *Hoti Mahtoon v. Hoti Hemanee*[2] where their Lordships after referring to the *Vyjaya* say, "Two rules applicable to the will now under consideration are laid down in this judgment of the Committee" one is "that a person capable of taking under a will must be such a person as would take a gift *inter vivos*, and therefore must either in fact or in contemplation of law be in existence at the death of the testator," page 211 * * * * And it is said page 212 "The real gist of law in this case is to be found in that applicable to gifts and even if wills were not universally to be regarded in all respects as gifts to take effect from death they are generally so to be regarded as to the property which they can transfer and the person to whom it can be transferred."

Now, turning to the *Vyjaya* case[3], we find that there against a gift to a person not in existence and capable of taking from the donor at the time when the gift takes

[1] (1907) I. L. R. 29 Calc. 867 (P. C.) : L. R. 29 I. A. 99.

[2] (1887) I. L. R. 12 Bom. 247 : L. R. 14 I. A. 89.

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purpose though that purpose would not be called a sentient person. [illegible] It would seem that the view propounded by Jenkins C.J. and I gave rise to the general proposition for which he was contending, viz., that the act of gift gave to the donee of property, than to its application to particular objects of benevolence. The notion that an idol is a person capable of holding property must be kept within its proper limits and were we to assent to the argument that has been advanced before us, we should be allowing fiction to be used on fiction in the interests and not for the furtherance of justice.

In my opinion, therefore, the reference should be answered by saying that the principle expressed by the phrase "relinquishment in favour of the donee who is a sentient person" does not apply to the direction contained in the testator's will that the persons nominated by him should spend the surplus income in the Abda and worship of Kanye after establishing the image of the Kanye after the name of the testator's mother, and that if and so far as the cases cited in the reference conflict with this view they have not been correctly decided.

Sircar J. In this case I have had the advantage of reading the judgments of my colleagues before writing my own. I agree with their conclusions and concur in their reasons and have in fact nothing to add to what they have said. But by reason of the importance of the case I wish to explain briefly how the matter presents itself to me, relying on my brothers Mookerjea and Chatterjea for the authorities and the texts, which are of course supreme in the consideration of the question before us.

There is no doubt, on the first place, that dedication by a Hindu of the property to a deity is not only lawful but commendable in a high degree. But the question arises what is the legal effect of such a dedication. A gift consists in two acts, abandonment of rights over the subject matter of the gift by the donor, and acceptance of those rights by the donee. In a dedication to a deity, the abandonment by the donor takes place according to the ordinary law but there can be no

[1] (1829) 1 Knapp 258.

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to be valid must be in favour of a sentient person in existence and capable of taking from the donor at the time when the gift is to take effect. I shall assume that was the view adopted by Jimutavahana. The question, however, necessarily arises whether this doctrine is applicable to the case of bequests for the establishment of images of the deity and for their worship. To secure an answer in the affirmative to this question, it is argued that, by a fiction of law, an idol is a juridical person, and in support of this view reliance is placed upon the cases of *Mohesswree Debia* v. *Mookerjee* (1) and *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick* (2). The later decision of the Judicial Committee in the case of *Jogadindra Nath Roy* v. *Hemanta Kumari Devi* (3), however, tends to indicate that this fiction must be employed cautiously and subject to many limitations. We must not, therefore, assume too readily that a Hindu deity is a juridical person for all purposes, and stands on precisely the same footing, capable of the same rights and subject to the same liabilities, as an ordinary sentient being, and we must closely examine the scope of the applicability of the passage in the Dayabhaga, which is the foundation of the argument that a bequest for the establishment of an image of a Hindu deity and for its worship is subject to the same rules as a bequest in favour of a human being.

The passage in the Dayabhaga, which is supposed to go to the root of the matter, is as follows:

दत्तं च द्वीपेऽपि सति हि दातरीशे सत्यसत्यादिके वाऽसत्यादिके वा दत्तस्य [illegible] (Bharat Sircomani's Edition, 1868, page 17).

This is translated by Colebrooke as follows: "That is actually seen in the world, even in the case of donation, the donee's right to the thing arises from the act of the giver, not from his relinquishment in favour of the donee who is a sentient person." (Chapter I, para. 21.)

In the very next passage Jimutavahana proceeds as follows:

[illegible] (Page 17).

(1) (1870) 13 Moo. I. A. 270.
(2) (1875) 14 B. L. R. 450; 23 W. R. 253; L. R. 2 I. A. 245.
(3) [illegible]

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the acceptance of a gift as a necessary condition for the validity as applicable to secular gifts alone. There is no foundation for the assumption that dedication to the deity or for religious purposes stands on the same footing. In fact, as Sreenath points out, an abandonment in favour of the deity is not contemplated within the term 'gift.' It is obvious from this that in the case of donation, after the owner has parted with his rights and before the subject-matter has been accepted, the property is in a peculiar position, so that when the term "property" is used in relation to what has been dedicated to the deity, it has a secondary sense different from what it bears when used in relation to persons.

Again, Shoolapani in his Sraddhaviveka discusses whether a *sraddh* can be called a gift, and in that connection observes as follows:—

[illegible] (Calcutta Edition, 1864, page 25.)

Of this passage, the following version will give a fairly accurate idea:—

"*Sraddh* has not the nature of a donation, as it does not generate ownership in the *ansas* etc., for whom it is intended. The absence of ownership of *ansas*, etc., is due to the absence of acceptance on their part by the words 'this is mine.' In 'donation,' having for its dative case the Gods like the Sun, etc., the term 'donation' has a secondary sense. The object of this figurative use being extension [illegible] of the non-attendance accompaniment of that (*gift* in its primary sense), viz. the offer of the sectional fee, etc. It has already been mentioned in the Chapter on the *Sraddh* that such usage as *Annagram*, *Anulagram*, etc., are secondary."

Upon this passage Sree Krishna comments as follows:—

[illegible]

"The Gods Indra, etc., being devoid of [illegible] cannot have ownership in any object. Then [illegible] the expression *Annagram* [illegible] village of the name *Annagram*." It has

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the acceptance of a gift as a necessary condition for its validity as applicable to secular gifts alone. There is no foundation for the assumption that dedication to the deity or for religious purposes stands on the same footing. In fact, as Sreenath points out, an abandonment in favour of the deity is not comprehended within the term 'gift'. It is obvious from this that in the case of donation, after the owner has parted with his rights and before the subject-matter has been accepted, the property is in a peculiar position, so that when the term "property" is used in relation to what has been dedicated to the deity, it has a secondary sense different from what it bears when used in relation to persons.

Again, Shoolapani in his Sraddhaviveka discusses whether a *sraddha* can be called a gift, and in that connection observes as follows —

[illegible] (Calcutta Edition, 1894, page 23.)

Of this passage, the following version will give a fairly accurate idea :—

"*Sraddha* has not the nature of a donation, as it does not generate ownership in the priest, etc., for whom it is intended. The absence of ownership of priest, etc., is due to the absence of acceptance on their part in the words 'this is mine'. In 'donation,' having for its datum even the deity like the Sun, etc., the term 'donation' has a secondary sense. The basis of the figurative use being extension (not of the unusable accompaniment of that *sraddha* in its primary sense), viz., the offer of the sacrificial fee, etc. It has already been remarked in the Chapter on the *Avatara* that such usage as *Avatara* as *Anugraha*, etc., are secondary."

Upon this passage Sree Krishna comments as follows —

[illegible]

"The Gods Indra, etc., being devoid of [illegible] cannot have ownership in any object. Then how can the expression *devasya ayam* (this village of the deity) be used? It is

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The inference that in the case of dedication to the deity, the term "gift" or "donation" has properly no application at all. This is also supported by the following observations of Sree Krishna in a passage of his commentary on the Smriti-tattwa:

यत्र देवताके उद्देशेन द्रव्यत्यागेऽपि स्वत्वनिवृत्तिः प्रकाशते तत्र ।
यत्तत्र तद्व न दानक्रियायां यदि प्रकाशं न लोकरूढितः, यत्र देवताप्रतिष्ठादिकं प्रकरणं न दानं तत्र विक्रय इति स्वत्व उत्पद्यते, यदि प्रकाशं लोकरूढितः (Calcutta Edition, 1892 page 16)

The following rendering gives a fair idea of the above passage:

"Here, in the generation of ownership by the abandonment of an object, the presentation of acceptance by the person to whom the object is given is regarded as an auxiliary cause.

Therefore, if the particular person for whom a gift is intended does not accept it afterwards, then, as donation with all its conditions is not accomplished, the ownership of the donor does not cease to exist. This is maintained by Ratnakar and others."

To the same effect is the following passage from the Mitakshara, in which Vijnaneswara commenting on verse 87 of the Vyavahara-adhyay of the Institutes of Yajnavalkya, observes:

स्वस्वामिसम्बन्धनिवृत्तिपूर्वकः स्वस्य परस्वामिसम्बन्धापादनं च यदा यदि लौकिकी सा प्रसिद्धी भवतः, लौकिकस्तावत् त्यागो दानम् इत्यभिधीयते, (Bombay Edition 1813 Saka, page 170)

"Gift consists in the relinquishment of one's own right and the creation of the right of another, and the creation of the right of another man is completed on that other's acceptance of the gift and not otherwise. Acceptance is made by three things—mental, verbal or corporeal."

This is also amply borne out by passages from the Bhasya of Savaraswami on the Purvamimansa. In one passage Savara defines the characteristics of a gift as follows:

दानमित्यस्वत्वपूर्वकं स्वत्वापादनम् (Adhyaya VI Pada 1, Asiatic Society's Edition, Volume I, page 712)

"A gift is the cessation of the ownership of one and the generation of the ownership of another."

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by the term) "God-property" (in this text, it is a compound word in the original, in which the word God is not inflected), and the property of a Brahman who is not in the habit of performing sacrifices is Brahman-property."

৫ অথবি যদি এভাবে অর্থ করা যায় তাহলেও এই শ্লোকটি গৌণার্থক হয়ে যায়।

5 Even in this manner this verse may pertinently be explained. The shloka (verse) becomes (then) a laudatory one.

৬। যদি দেবতার সম্পত্তি ও যাগাদিকর্তৃক যজমানসম্পত্তি

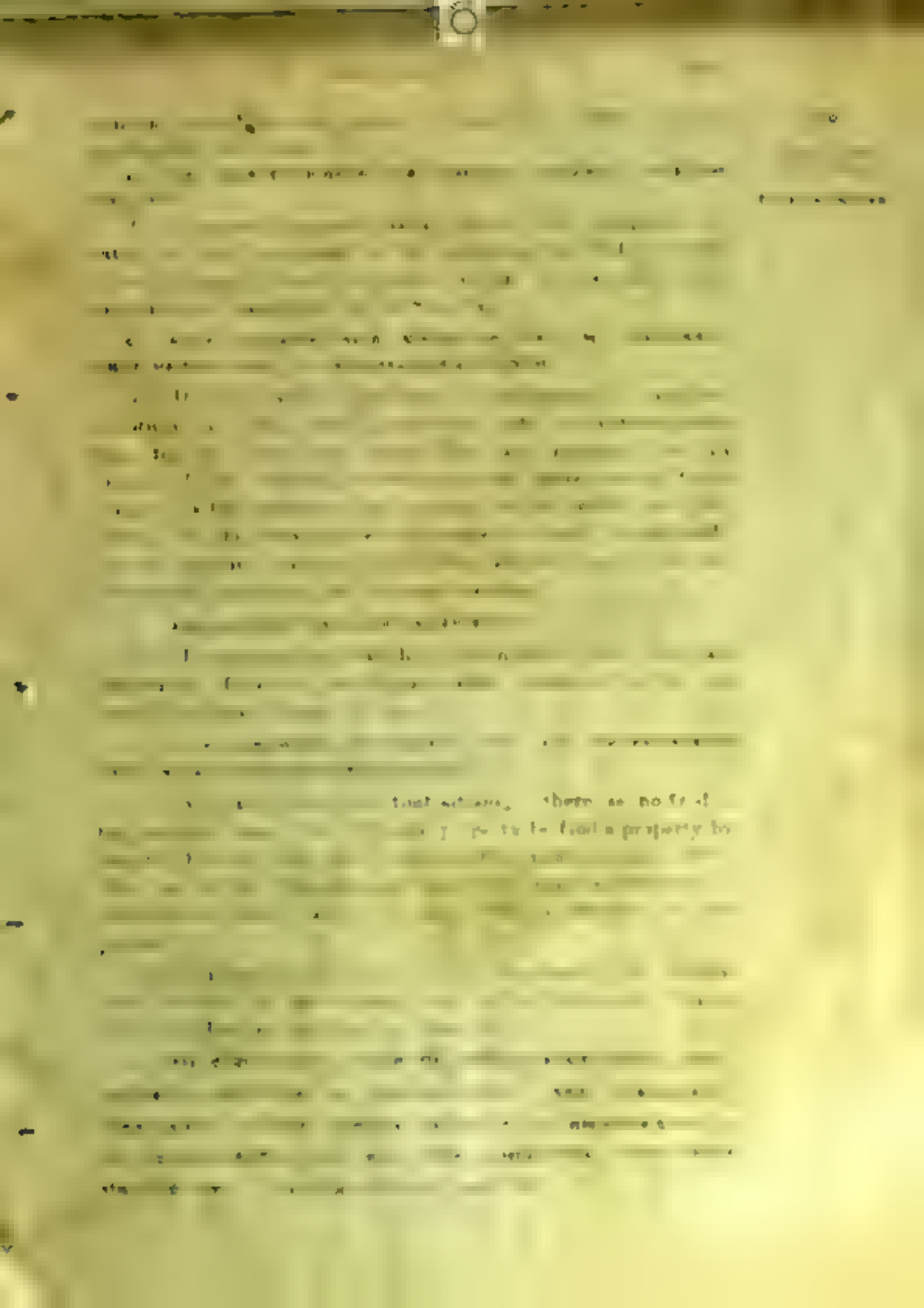
6 For the property of persons habitually performing sacrifices (explained by us as the import of the term "God's property") is not (the meaning derived from the primary meaning of the words (composing the term, namely, God and property) like (the meaning of the term stealing and the like (but a figurative meaning).

৭। যদি,তথা মুখ্যার্থত্ব বৈয়াধিকরণ্য মুখ্যবিরোধাদি দোষ হয়, তাহলে অন্য প্রকারে ব্যাখ্যা করা যাক।

Hence (the term) is explained in another manner (thus)—Property that is set apart or relinquished for the purpose of performance of sacrifices and the like in honour of Gods is (to be taken as intended by the term) "God's property" by reason of the impossibility of the application to Gods of the primary meaning, namely, the relation of property and owner (a thing is property in relation to a person having proprietary rights over it, and a person is owner in relation to a thing over which he can exercise proprietary rights).

৮। যদি দেবতা দক্ষিণা দান নিষ্ক্রয় ও ও পরিবেষ্টনকারণকারণ হয়েন, তাহলেও সাধ্যসুখের সম্বন্ধ হেতু তিন প্রকার বেদ দ্বারা দেবতার স্বামিত্ব—এই প্রকার সম্বন্ধরূপ মুখ্যার্থ ব্যাহতত্বাদিদোষসমূহের নিমিত্তকারণত্বরূপ গৌণার্থকত্বাদি

8 For the Gods do not use the property according to pleasure, nor is their found exertion for the protection (of the property) and property is described to be of that character in popular view. Accordingly when by referring or pointing to Gods, it is stated—This is not mine, this is God's (that is God's property—and that property is enjoined by the Vedas) for the Fire-God and the like in the Darsa-purnamasa sacrifice and the like—(and also enjoined) by the well known practice of the learned (not by the Vedas, for Gods worshipped) in the Durga sacrifice and the like secondary means (of attaining



Noon
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Ram Lal Maitra

It should be noticed that such expressions as property of the Gods, articles of the Gods (being of the Gods, etc., meat animals etc., supposed to be intended for the Gods. In the section on punishment, the term देवता, 'God' is desired to be used in the sense of images only, otherwise there would be an upsetting of the established order. In such texts as "anything good belonging to the Gods Brahmans and Kings should be known etc., i.e., a thing belonging to the Gods which is permeated with an imaginary ownership of the images or likenesses imagined to be Gods. *The Gods have no ownership of these* etc., and as the primary sense being inadmissible here, the secondary sense alone should be accepted."

It is conclusively established from these authorities that according to strict Hindu principal notions there can be no gift in favour of the Gods. We are not concerned now with the philosophical reason for this position, and it is needless to enquire whether it is due to the fact that in the earliest times physical objects were loved, and could not, therefore, be very well supposed to be capable of acceptance of a gift, or to the fact that the deity was conceived as a being to whom a mortal could not aspire to make a gift, but could only content himself with a dedication of things for acceptance. Durgacharya, however, in his commentary on the following passage of the Nirukta, seems inclined to adopt the view that as the Gods were originally physical objects deified, they could not very well be regarded as sentient beings capable of acceptance of gifts in the strict sense of the terms.

The following version will give a fairly accurate idea of the passage which deals with the subject of the anthropomorphic and physical conception of the Gods:—

यज्ञादावपि त्रिविधा देवताया पूजाविधयः, अधिकं फलमावहन्तिफलसंयुक्तेषु तथाभिधानादर्शनाच्च, तत्रयत्रे 'यज्ञो वै देवेभ्योऽधिक्रियते' इत्यादि (शतपथ ब्राह्मण) 'यद् वेदमन्त्रा अयजन्त यानि यजूंषि' (१०।१०।१०) इत्यादि पौरुष विधिर्न दर्शितः। या तथा कृत्रिमाभिमुखं दृष्टिं (१।१०।१।४) 'उत्तानहस्तो ददाति तद्दैवं' (शतपथ ब्राह्मण) इत्यादि पौरुष विधिर्न दर्शितः। यद्वोऽन्तं त्रिविधं प्रविभजन्ति (१०।१२१।८) 'यावद् वर्षं वृष्टी ददत' (१।१२०।७) * * * यदपि किञ्चिदाधिदैवमस्ति न तत् प्रमाणं पुरुषविधं तद् यथाविधानुकल्पेन, दृष्टिर्वी यज्ञस्य हविः स्वाभाविकत्वादर्थवत्तरस्य

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The same view is supported by Hegde, s. 1 11 1, and Atharvaveda Book XX Hymn 6a, 4 and 7. It is not necessary, however, to pursue this line of investigation further. We start with the position that in the case of deities there cannot be any acceptance and, therefore, necessarily, any gift. If therefore, a dedication is made in favour of the deity what is the position? The owner is divested of his rights. The deity cannot accept. In whom does the property vest? The answer is that the king is the ultimate trustee of all such property. This is authoritatively indicated by the following passages. Vijnaneswara in the Mitakshara Vyavahara Adhyaya, verse 180, lays it down that one of the duties of the King is the protection of the Devagriha, and Aparaditya and Mitramisra in their commentaries on the same subject lay down the rule in the same manner. In the Sukranitti, Chapter IV, verse 13, stress is laid upon this as one of the primary duties of Kings. The true Hindu conception of dedication for the establishment of the image of the deity and for the maintenance thereof is that the owner divests himself of all rights in the property, the King, as the ultimate protector of the State, undertakes the supervision of all endowments. There is no acceptance on the part of the deity, but from the dedication, religious moral and spiritual benefit accrues to the founder and material benefit accrues to the persons in charge of the worship and to the creatures of God.

It may further be observed that it is indisputable that the Hindu law encourages dedication of property for religious purposes. It is sufficient to refer to the following passage from Katyayana.

[illegible] which is rendered by Mandlik at [illegible] page 121 Bal Gan Yajnavalkya):

"If a gift be promised by a person, whether in health or in sickness and for a religious purpose, and he dies without making it, his son should be compelled to make it. Of this there is no doubt."

There can be no question as to the genuineness of the passage, because it is quoted with approval in the Mitakshara, Viramitrodaya, Vyavahara Anukhanda, Vyavaharamayukha

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Various passages of the same import are to be found in other authorities, for instance, Hemadri's Chaturvarga Chintamani (i, 16), the latter of which quotes a passage from Manulaxmanatantra and gives other texts of similar import from Kularnabatantra and Agastya Samhita. From this point of view also, the position of the appellant may be undoubtedly supported, but it is not necessary to base my opinion upon this ground, for it is established beyond the possibility of dispute that the ordinary conception of a gift is not applicable to the case of dedication to the deity.

Let us now consider the decided cases from the point of view of the principles already explained. The cases of *Upendra Lal Basak v. Hem Chandra Basak*[1] *Rajmohan Jiuar v. Tinkaikhe Mohanty Jiuar*[2] and *Nagendra Nath Jiuar v. Hemanta Kumari Debi*[3] proceeded upon the assumption that the rule in the case of *Tagore v. Tagore*[4] and *Hur Narain v. Ram Manohar*[5] is applicable to cases of dedication of property for the establishment of images of deities and for their worship. The case of *Promotho Nath Roy v. Nagendra Nath Mukherjee*[6] rests on the same assumption. The case of *Dongar Pershad Dass v. Shiv Pershad Pershad*[7] has not directly touch the point, though it appears to have been held that an idol cannot be said to have juridical existence, unless it has been consecrated by proper ceremonies and so has become apotheosised. Nor does the earlier case of *Srikissen Mullick v. Poorpooreh Soondry Dassee*[8] really affect the question now under consideration. The Court proceeded on the ground that it would not require trustees to carry out trusts for religious purposes under the will of a Hindu, unless those purposes were defined. On the other hand the cases of *Rantosh Mullick v. Ramroop Mullick*[9], *Grish Nath Sarkar v. Issur Lochun Roy*[10] *Prosonno Chunder Mozumdar v.*

[1] (1897) I. L. R. 24 Calc. 433
[2] (1901) I. L. R. 29 Calc. 290.
[3] (1903) I. L. R. 31 Calc. 621.
[4] (1872) 9 B. L. R. 377 L. R. I. A. Sup. Vol. 47
[5] (1887) L. L. R. 21 Bom. 799 L. R. 24 I. A. 93
[6] (1910) 12 C. W. N. 909
[7] (1880) 7 C. L. R. 275
[8] (1843) Fulton 58
[9] (1829) 1 Knapp 1
[10] (1886) I. L. R. 14 Calc. 252

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with the view previously expressed by the Judicial Committee in *Hills* v. *Evans*, namely, that it is quite impossible to maintain the proposition that a gift to charity is to be construed as a legacy to an ordinary legatee who must be sufficiently pointed out and described. The case before us, in which no question of mal-feasance can possibly arise, consequently occupies a much stronger position.

It is further clear that under the English law a valid gift may be made to a charity not in esse at the time but to come into existence at some uncertain time in the future, provided there is no gift of the property in the first instance, for the benefit of any private corporation or person, or perpetuity to a prior taker. One of the most recent decisions on the subject is that of *Hoadley* v. *Board of Trustees of the New Zealand*[1] which was heard on appeal by the Judicial Committee from New Zealand. In that case certain Maoris chiefs in 1848 gave 500 acres of land to the Bishop of New Zealand for a college to be erected thereon for the general purpose of promoting religion. Up to 1878, no college had been erected, and it was found that the land had increased in value to a considerable sum. It was held that there was an express gift of land and money to constitute a trust and that such a gift was not invalidated by the fact that the particular application directed could not immediately take effect or would not of necessity take effect within a limited period of time and might never take effect at all. It was further held that the doctrine of *cy-près* was applicable. Lord Macnaghten in his judgment relied in support of this proposition upon the decision of Lord Selborne in *Chamberlayne* v. *Brockett*[2]. This, however, is only one of many instances in which the English Courts have affirmed this doctrine and the cases where charitable gifts to unincorporated corporations or societies have been sustained are really numerous. The leading case on the subject is that of the Downing College reported under the name of *Attorney-General* v. *Downing*[3] and under the name of *Finch* v.

(1887) 12 A. C. 482.
[2] 8 Ch. D. 206.
[3] (1908) App. Cas. 173.
[4] [illegible] Appeals [illegible] 1 Dick. 414.

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To sum up:

(1) The view that no valid dedication of property can be made by a will to a deity, the image of which is not in existence at the time of death of the testator, is based upon a double fiction, namely, first, that a Hindu deity is for all purposes a juridical person, and secondly, that a dedication to the deity has the same characteristics and is subject to the same restrictions as a gift to a human being. The first of these propositions is too broadly stated, and the second is inconsistent with the first principles of Hindu jurisprudence.

(2) The Hindu Law recognizes dedications for the establishment of the image of a deity and for the maintenance and worship thereof. The property so dedicated to a pious purpose is placed *extra commercium* and is entitled to special protection at the hands of the Sovereign whose duty it is to intervene to prevent fraud and waste in dealing with religious endowments. *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram*[1] affirmed, on appeal, by the Judicial Committee in *Ghelabhai Lakhmiram* v. *Manohar Ganesh Tambekar*[2]. It is immaterial that the image of the deity has not been established before the death of the testator or is periodically set up and destroyed in the course of the year.

On these grounds I agree with the learned Chief Justice that both the questions referred to the Full Bench ought to be answered in the negative.

COXE J. I agree with the learned Chief Justice.

CHATTERJEE J. The testator Haresh Chandra Sahu died on the 28th June, 1900, after having made a will on the 26th of June, 1890. Amongst other matters the will provided,—"All my properties shall be placed in the hands of "Babus" and so "as trustees". They were to give certain annuities, to defray the expenses of certain named relatives, to pay Rs. 10 per annum to his *guru* Hari Nath Bhattacharyya and Rs. 5 to his *purohit* Sreesh Chandra Chakrabarti to defray the cost of the worship of the family *Thakur*. It also directed that "they shall spend the surplus income which may be left in the

[1] (1887) I. L. R. 12 Bom. 247.
[2] (1900) I. L. R. 24 Bom. 30; L. R. 26 I. A. 197.

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been correctly decided so far as they lay down the proposition that a gift to a Hindu deity, whose image is to be established and consecrated in future is void?

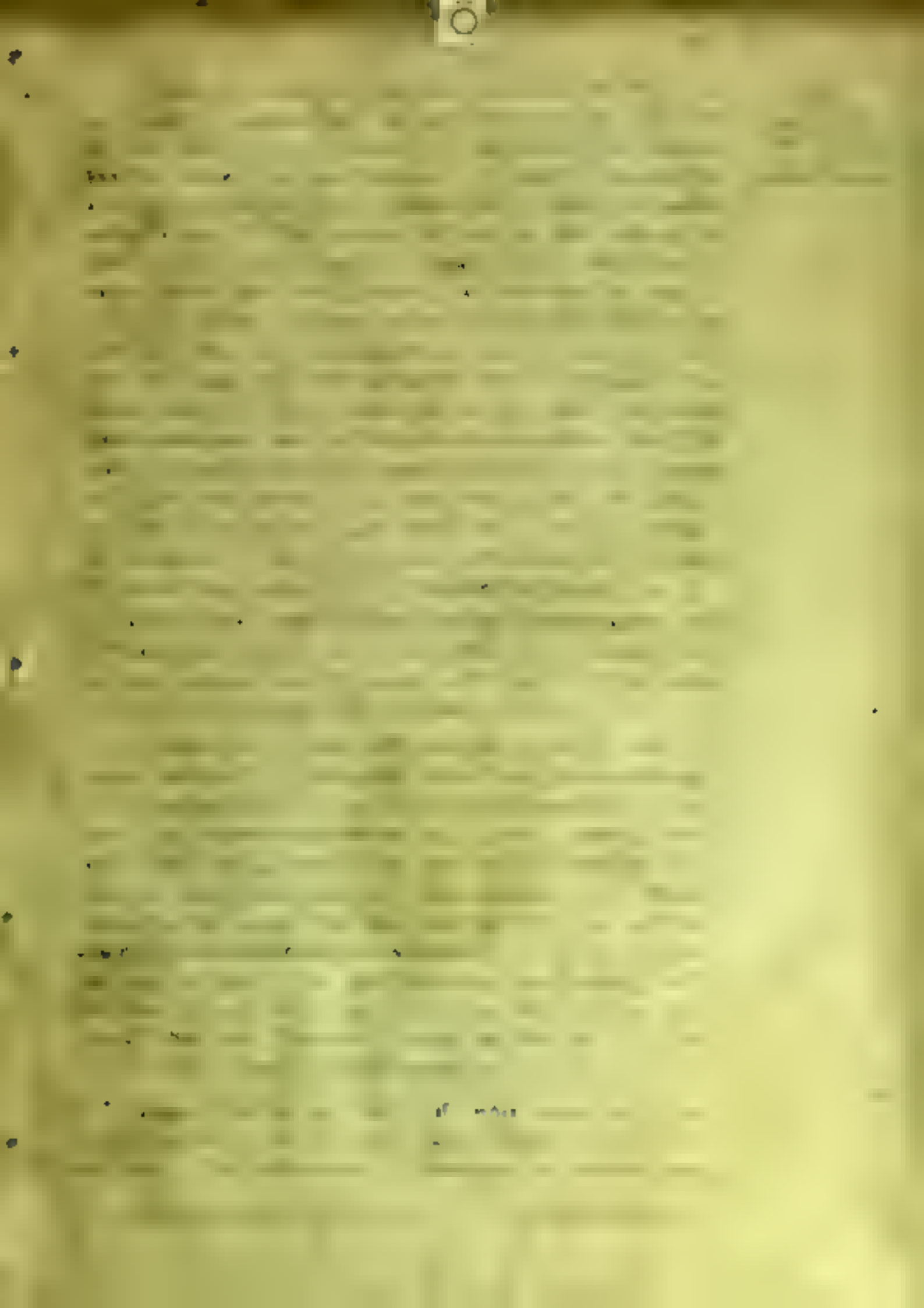
The cases mentioned in the order of reference are all, more or less based on the opinion of the great Jagannadha Pandit who in one case was in respect of a gift to a human being and was cited in support of the Dayabhaga, Chapter I, para 21 which is to the following effect:

"The right of one man consistently arises from the act of another for as even the passage next is authority for it, and that is nothing even in the world wise, in the case of doubt on, the donee's right to the thing arises from the act of the giver, namely, from his relinquishment in favour of the donee who is a sentient person."

Colebrooke's translation.

The next para (22) of the same book says that the title of the donee accrues before the completion and para 21 says that the acceptance makes the title complete but is merely an aid capable of subsequent withdrawal from the Nibandhas which have the full effect of acceptance before acceptance. The author is here concerned only with the meaning of the word gift and not at all with any feature of force to the subject. Of the commentators on the Dayabhaga, Srinath says देवतोद्देशेन त्यागे सति यावत् "the word 'sentient' is ignored, of course, so that even a gift to a deity is complete as soon as the donor relinquishes his right in favour of a deity or the worship in connection with which the image is given," Achyutanand, [illegible] "a single act or act of relinquishment would be sufficient to include the delivery of the money, etc. and therefore the word 'sentient' is used." Srikrishna Tarkalankar also says [illegible] "in the dedication of the said land [illegible] the same accrues to any one, the word [illegible] relinquishment is spoken of in reference to a 'sentient being.'"

* (1872) [illegible]



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प्रयोगस्यवदाचेत दानवदो नौण यथाकंदविषयदानसंकल्पाय ' i.e., ' the use of the word दान or gift in respect of a gift to the Sun and other Gods is secondary or figurative and intended to signify, by analogy, the giving of the fee in either case." Sreekrishna Tarkalankar, the great commentator of the Dayabhaga, in his commentary on the above passage, says प्रयोगस्य मुख्यविषयस्य इत्यस्यायात् दुष्प्रयोगो न इत्यर्थः, *i.e.*, "here also the use of the word in its primary sense is impossible, as there is no sense of one's own ownership" (like that of the donee in a secular gift).

Medhatithi, the great commentator of Manu, in commenting upon the word *devasva* (god-property) in Manu, Chapter XI, Section 21 says देवस्वरक्षा प्रतिषिद्धयोः यत् तावत्स्वं नहि तत् मुख्यया वृत्त्या देवस्य इत्यतः देवस्वं यत्तावत् यदि देवस्य स्वत्वं तत् विद्यते न च परिग्रहसंरक्षणादयः तस्य सन्ति इत्यतः *i.e.*, "Property that is relinquished in favour of Gods for sacrifices in their honour is called god-property, by reason of the impossibility of the application to Gods of the (ordinary) relation of owner and thing owned for the Gods do not use the property according to their pleasure, nor do we see them exerting for the protection of the same."

Again यत् चतुष्पात् प्रतिमा तत्प्रभृति लोके देवस्वमुच्यते लोक प्रसिद्धेन तत्र शब्दार्थः ग्राह्यः इति चेत् न देवस्वशब्दस्योभयार्थत्वात् प्रसिद्धिमपेक्षते, देवस्य च देवस्वसिद्धयर्थं प्रसिद्धा सम्बन्धार्थं सम्बन्धे च न तत्स्वामित्वं प्रसिद्धमस्ति तस्मात् चतुष्पात् प्रतिमा देवस्य मम तत्स्वमिति सम्बन्धस्य प्रसिद्धेरभावात् न च प्रसिद्धसम्बन्धस्य देवस्य मम तत्स्वमिति चात्र सम्बन्धः प्रतीयते न च प्रकरणेन सम्बन्धविशेषनियतिरिह विद्यते. "It cannot be argued that in popular view (property relating to the four-armed or the like image of God) is called "god-property" and it is proper to put the popular meaning of words occurring in the *shastras*. It would be as if the term 'god-property' acquired notoriety (in that sense) as a single undivided word, but by reason of the notorious meaning of the component parts of the word, namely God and property, the meaning of the whole, that is, God's property is god-property, is preferable. Nor is there any evidence for referring another passage for the purpose of supporting the proposed meaning. The assumption that the four-armed and the like have the status of God in the primary sense is removed by the very use of the term image. Nor can it be argued that although there is a

[1] Smritichandrika, Chandi Charan's Ed., p. 29.

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made of clay or gold or other substance, as a mere glance at the mantras and prayers will show. They worship the eternal spirit of the deity or certain attributes of the same in a suggestive form, which is used for the convenience of contemplation as a mere symbol or emblem. It is the incantation of the *mantras* peculiar to a particular deity that causes the manifestation or presence of the deity or, according to some, the gratification of the deity. According to other view, it is the relinquishment of property in the name of the deity, for securing its gratification, that completes the gift, and such relinquishments are valid according to Hindu Law, even if made by a dying man. It may be true that the illiterate Hindu thinks of the consecrated symbol as the deity and has not any clear idea of the particular attributes of the God-head, that is worshipped in a particular form but it cannot be said with any approach to truth that the great Rishis and their commentators who declared the Hindu Law had such a gross idea of the divinity they worshipped. In this view of the case also, the text of the Dayabhaga relied on in the *Tagore case*[1] cannot invalidate the gift in favour of a deity whose image is consecrated after the death of the donor.

Then again their Lordships of the Judicial Committee, in the *Tagore case*[1] say that the object of the donation must be in existence, at least in contemplation of law, and as an instance, the case of an adopted son is mentioned as, by a fiction of law, he is supposed to have been conceived during the lifetime of the adoptive father. It is contended that Anandamoyee Kalee was not in existence during the lifetime of the testator, although the Goddess Kalee was, is and always will be in existence. Suppose a Hindu gives permission to his wife to adopt a son after his death and to name him by a particular name 'Ram,' 'Syam' or 'Gopal.' It cannot be contended with any semblance of reason that a son adopted by the widow and named as directed by the adoptive father would not be validly adopted, because a son of that particular name could not be supposed to have been conceived by reaction back to the lifetime of the father. It is not necessary to apply the same analogy in the case of a deity, as the reasons hereinbefore enumerated will

(1873) 9 B. L. R. 377, 18 W. R. 30; L. R. I. A. Sup. Vol. 47.

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the celebration of the periodical festivals, called Dolejatra, Rathjatra, etc., have been from very old times given effect to by our Courts. Instances will be found in the following cases:—

Ramkumar Mullick v. *Ramgopal Mullick*,[1] *Ashutosh Dutt* v. *Hooreea Churn Chatterjee*,[2] *Hemangini Dasi* v. *Nobin Chand Ghose*,[3] *Gasool Nath Guha* v. *Issur Lochun Roy*,[4] *Bhuggobutty Prosonno Sen* v. *Gooroo Prosunno Sen*,[5] *Bisseswar Prosunno Sen* v. *Bhugobati Prosunno Sen*,[6] *Profulla Chunder Mullick* v. *Jogendra Nath Sreemany*, *Juggun Nursingh* v. *Annerbai*,[8] and *Manohar Ganesh Tawdekar* v. *Lakhmeeram Govindram*.[9]

If a gift in favour of a deity, whose image has to be prepared and destroyed periodically, is valid, I do not see any reason why a gift in favour of a deity, whose image is to be prepared once for all, except for any reason for reconstruction coming to pass, should be invalid.

In the present case again, the testator does not expressly make a gift to Kalee or Annadamoyee Kalee. He only vests his properties in certain trustees who are to employ the surplus income of the properties in a certain way, by spending the same in the establishment, *sheba* and *puja* of the Goddess Kalee under the name and style of *Iswar* Annadamoyee Kalee. I do not see how the rules of gift to a deity, even if they were not as I have stated above, can invalidate the bequest in this case. For the reasons stated above, I would answer both the questions referred in the negative.

PER CURIAM. The order of the Court accordingly is that the case be returned to the Division Bench to decide the matter in accordance with the opinion we have expressed.

Case remanded.

NOTE. Debutter property is property dedicated to God or Gods. Where in a document there was nothing to show that there was such a dedication except the use of the word "Debutter" and the grant is made apparently for the personal enjoyment of the grantee, and the grantor may have contemplated

(1829) 1 Knapp. 45.
[1] (1879) I. L. R. 5 Calc. 433: L. R. 6 I. A. 182.
[2] (1882) I. L. R. 8 Calc. 789.
[3] (1886) I. L. R. 14 Calc. 222.
(1887) I. L. R. 15 Calc. 112.
(1888) 16 C. L. J. 64.
(1888) 6 C. W. N. 428.
[4] (1885) I. L. R. 11 Calc. 401.
[5] (1887) I. L. R. 14 Bom. 347.

20

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Beachcroft

KATKI AND ANOTHER

v.

LAKPATI PUJARI.*

Reported in 20 C. L. J. 119, 36 I. C. N. 19.

1914 May 20 1918 April 22

Appeal by Defendants Nos. 3 and 4.

Suit for declaration of title to land and for recovery of possession thereof.

The plaintiff, a member of aforegenerate class, was alleged to be taken in adoption by his uncle A. The defendants were two of the daughters of A. They challenge the *factum* as well as the validity of the alleged adoption. The Courts below held that the adoption in fact took place that *Datta Homam* ceremony, which was not performed, was not necessary in the case of an adoption of nephew, and decreed the suit.

The judgment of the Court was delivered by

Mookerjee, J.—This is an appeal by the third and fourth defendants in a suit for declaration of title to land and for recovery of possession thereof. The property in dispute belonged to Pitabas, one of four brothers, who were members of a Hindu family governed by the Mitakshara law. The plaintiff is one of the sons of a brother of Pitabas, and his case is that he was taken in adoption by his uncle in the year 1909. The defendants, now appellants, are two of the daughters of Pitabas, who would be entitled to succeed to the estate of their father in the absence of an adoption. They consequently challenge the *factum* as also the validity of the alleged adoption. The Courts below have concurrently found in favour of the plaintiff and decreed the suit. They have held on the evidence that the adoption did in fact take place, that since then the plaintiff has been treated as the son of Pitabas, that the thread and marriage ceremony has been performed as such, and that he has performed

[illegible] father and enjoyed [illegible] as his own [illegible]

[illegible] was held valid and the claim of [illegible] the adoptive father sustained. The [illegible]

[illegible] it is too broadly formulated, and that no [illegible] is necessary when the son of a brother is taken [illegible] In support of this contention reference has been [illegible] and *Falshoo* v. *Jowand*. In our opinion the [illegible] not been affected by the non-performance of [illegible]

[illegible] gift and acceptance alone that is [illegible]

[illegible] by Prof. Bharut Chandra Sirumani [illegible] of Prasanna Kumar Tagore [illegible] is added by the author of [illegible]

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Dattaka Darpana that the expression 'Brothers-son' includes persons who are sapindas and sagotras and that consequently it is only when an adoption is made of a sapinda or sagotra relative, the rule for performance of the Datta ceremony operates. The text which was quoted as early as 1811 by the Pandits consulted in connection with the case of *Ma Lutt Hoo v. Ramaderia*,[1] has also been accepted as genuine in the case of *Lalubhai v. Jivandas*[2] and *Harsukhram v. Motiram Lalu*[3] and its authority was treated as unquestionable by V. N. Mandlik (Vyavahara, page 581). The sole comment in the text of Yama was also recognised by a Full Bench of the Madras High Court in *Venkayya v. Narasayya*[4] on the authority of an opinion expressed by Colebrooke that that sloka, though proper in all cases, was not indispensable in the person adopting nor the boy adopted were of the same gotra. It has been argued, however, that the text of Yama is not based on any intelligible reason which could justify a departure from the general rule that the Datta-homa is an essential ceremony for the validity of an adoption amongst members of the three regenerate classes. We are not prepared to accept this contention as well founded. There has been considerable divergence of opinion amongst text writers ancient and modern, which is reflected also in judicial decisions upon the question, whether the Datta-homa is essential for the validity of an adoption; and even if it be conceded that there is a strong body of opinion in favour of the view that it is obligatory in the case of adoption amongst Brahmins, we would not be disposed to ignore or even to minimise the effect of an exception for which direct authority may be found in a text of unquestionably great antiquity and authority.

To take the texts first, it is plain that Yama undoubtedly contemplated nothing more than a formal ceremony for the validity of an adoption as the Dattaka Purana in dictating the Dattaka says that the gift is to be made 'together with water,' that is as Sir William Jones renders it, 'the gift is confirmed by pouring water.' 'That (boy) equal (to mine) whom his mother or his father with libations gives (containing

[1] (1821) 2 Borr. 653; (1859) 7 L. R. (I. A.) 188.

[2] (1884) I. L. R. 8 Bom. 418.

[3] (1885) I. L. R. 9 All. 370; L. R. 13 Ind. [illegible]

[4] [illegible]

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Lakpati Pujari.

lays down that the final relation of the two sons previously mentioned proceeds from adoption, only with observance of the form of either Vasistha or Saunaka and not otherwise. This is emphasised in Sec V, Para 36 where the general conclusion is stated that the final relation of adopted sons is occasioned only by the proper ceremonies, and that the final relation even fails, should other gift, acceptance, a burnt sacrament and so forth, be wanting. Reference may also be made to Sec V, para 47 where an ingenious attempt is made to read this interpretation into the simple text of Manu (IX, 168), and to Sec V, para 55 where a quotation from Medhatithi, which cannot be traced in his commentary on Manu, is similarly treated. To the same effect is the statement in the Dattaka Chandrika, Sec II, Para 17 where it is recited, after the description in Para. 16 of the mode of adoption prescribed by Hariharavara for followers of the Taittiri Veda that in case no form as propounded should be observed, the adopted son will be declared entitled to assets alone for his marriage. This is reiterated in Sec VI, Para 3, where reliance is placed on a text of Manu which has not been traced "He who adopts a son without observing the rules ordained, should make him the participator of the rites of marriage, not a sharer of the wealth." In this connection, it is worthy of note that the opinion has been expressed by Sastri Tarap Chandra Sarkar (Tagore Lectures on Adoption, p. 124, Hindu Law, 4th Edition, page 126), that the Dattaka Chandrika was composed about the year 1800 for the purposes of a particular litigation by one Raghunanda Vidyabhusana who passed it off as the work of Kaveca. Nemo is notice need not accordingly be taken of a text which has not been found in the Institutes of Manu. There remains, however the opinion of the author of the Dattaka Mimamsa, which is no doubt entitled to weight. As against this opinion, we have the contrary view maintained by commentators of repute. Sankarabhatta, in his work styled the Dharma Divata Nirnaya in the chapter styled the "Solution of doubts in regard to adoption," which has been translated by Mandlik, page 35, lines 39-43 says that by the operation of the rule Yatha Saktinaya (the rule which enjoins the observance of precept as far as possible) the homa (sacrifice, or the like, which

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produced and whose authority on questions of Hindu Law ranks only next to that of Jimutavahana, Raghunandana and Srikrishna. The divergence of opinion to which we have referred, has led to a similar want of unanimity amongst leading text writers of the last century. Thus, Shama Churn Sirkar strenuously maintained, to the end, the view that the Datttahoma is essential, not only in the case of the three regenerate classes, but also in the case of Sudras, and wrote a learned criticism on the contrary opinion established by a Full Bench of this Court [*Behari Lal* v. *Indramani*[1]], subsequently approved by their Lordships of the Judicial Committee, *Indramani* v. *Behari Lal*[2]; Vyavastha Darpana, 3rd Ed., Part I, p. 353; Part II, p. 574; Vyavastha Chandrika, Part II, p. 125) Dr. Jogendranath Bhattacharyya acquiesced in the view that the Datttahoma is not necessary in the case of Sudras, but maintained that it is essential in the case of the three regenerate classes [Hindu Law, 3rd Ed., Vol. I, p. 450]. On the other hand, Sastri Golap Chandra Sarkar follows the view of Jagannath that the absence of the Datttahoma does not in any case affect the validity of an adoption [Tagore Lectures on Adoption, p. 377].

When we turn to examine the course of judicial decisions on the subject, we meet with a similar absence of uniformity. But one point is now finally settled, *viz.*, no religious ceremony is essential in the case of adoption by Sudras. This had been formulated by the Supreme Court of Calcutta as early as 1800 when Sir John Anstruther, C. J., with the concurrence of Boyds and Russell JJ., held, in the case of *Gopee Mohun Deb* v. *Rajeeruton Deb*[3] that the adoption was valid ly made if gift and acceptance of the child by an overt act was shown to have taken place. The elaborate judgment of the Chief Justice is mentioned by Sir Thomas Strange in his Elements of Hindu Law, 1825, Vol. I, page 81, but has never been traced. There was, after this, a uniform succession of decisions to that effect: *Joymony* v. *Sibo Soondry*,[4] *Dayamayee* v. *Rashbari*,[5] *Ramkishore* v. *Bhubanmayee*,[6] *Perkash Chandra* v. *Dharmani*,[7] *Sreemanta* v.

[1] (1874) 13 B. L. R. 401; 21 W. R. 288.
[2] (1877) L. R. 7 I. A. 24, I. L. R. 5. Calc. 776.
[3] „ (1800) Montriou Hindu Law Cases, 281.
[4] (1837) Fulton 75.
[5] (1852) Beng. S. D. A. 1093.
[6] (1859) Beng. S. D. A. 229.
[7] (1859) Beng. S. D. A. 96.

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view in Madras, as indicated in *Gobindayar* v. *Doraisami*[1] and *Ranganaya Kamma* v. *Alwar*,[2] is sought to be supported by reliance on the dictum of the Judicial Committee in *Makaraja Sivanath* v. *Srimati Krishna*[3] to the effect that "amongst the twice born classes, there can be no valid adoption by deed, and certain religious ceremonies, the Dattahoma in particular, are in their case requisite." A similar view is embodied in the extract from Savara Swami translated by Ellis (Strange's Hindu Law, 1825, Vol. II, p. 192) and had also been put forward by the Pandits who were consulted in the cases of *Alank Manjari* v. *Fakir Chand*[4] and *Bullubdoss* v. *Kishenjeea*.[5] The statement by Dwarkanath Mitter, J. in *Lachman* v. *Mohun*,[6] to which reference has already been made, points in the same direction, and *Thakoor Oomrao* v. *Thakooraee*[7] leads to the same conclusion, though it recognizes that the ceremony may be performed at any place. There are also expressions in *Rayji* v. *Laxmibai*[8] which may possibly be called in aid by those who seek to support the more stringent rule. In this diversity of judicial opinion, it must be conceded that the principle that Dattahoma ceremony is essential for the validity of an adoption among Brahmans, still counts a strong body of supporters, and that the rationalistic view has not yet finally triumphed over formalism. Yet among all this divergence of opinion, the doctrine clearly emerges that the Dattahoma is not necessary when the adoptive father and the adopted child belong to the same Gotra. *Govindayyar* v. *Doraisami*,[1] *Ranganaya Kamma* v. *Alwar*,[2] *Thangakaami* v. *Ramu*,[9] *Vedavalli* v. *Mangamma*,[10] *Valubai* v. *Govind*,[11] *Atmaram* v. *Madhavji*,[12] *Nityanand* v. *Kishen Dayal*.[13] It has, indeed, been argued that this distinction is not based on logical grounds, and that the view cannot be maintained that Dattahoma becomes unnecessary where the adoptive father and the adopted child belong to the same Gotra because a change of Gotra is not

[1] (1887) I. L. R. 11 Mad. 5.
[2] (1889) I. L. R. 13 Mad. 214.
[3] (1880) L. R. 7 I. A. 250 (256).
[4] (1834) 6 Mac. Sel. Rep. 350 (418 N. E.)
[5] (1839) 6 Mac. Sel. Rep. 319 (370 N. E.)
[6] (1871) 16 W. R. 179.
[7] (1869) 3 Agra H. C. R. 109.
[8] (1882) I. L. R. 11 Bom. 381 (393).
[9] (1882) I. L. R. 5 Mad. 358.
[10] (1903) I. L. R. 27 Mad. 538; 14 M. L. J. 340.
[11] (1893) I. L. R. 24 Bom. 218.
[12] (1884) I. L. R. 6 All. 270.
[13] (1871) 15 W. R. 300.

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necessary in such a case. It is not necessary for our present purpose to examine, whether what is thus regarded as an exemption is based on logical grounds, or, as is not improbable, really indicates a modern relaxation of the primitive indefeasible rule, to the growth of which, as in so many archaic systems, formalism exercised a dominating influence. Whether the rule itself will ultimately stand discredited and disappear, it is needless to speculate in this instance; it is sufficient to hold that the present case falls within the text of Yama and is covered by a long series of decisions which affirm the doctrine that even amongst twice-born classes, the Dattahomia is not essential when the adopted boy is of the same Gotra as his adopter.

In this view, the validity of the adoption of the plaintiff must be upheld, the decree of the Subordinate Judge affirmed and this appeal dismissed with costs.

Appeal dismissed.

Note.—There should be a giving and a taking to constitute a valid adoption. Sreenath v. Krishna Sundari, L. R. 7 I. A. 203; I. L. R. 6 Calc. 796. See also Ali Ahmad v. Bishambar, 19 M. I. A. 90 at p. 101 where their Lordships say: "It is admitted on all hands that it is only by reason of the gift that the filial relation to the natural father is extinguished." But such a giving and taking as is necessary to constitute a valid adoption cannot be effected by mere execution of deeds without more. 11 B. L. R. 178; 17 A. (Rep. vol.) 140; 7 I. A. 250; 2 C. W. N. 194 (198). And deeds are in no way necessary to render the adoption valid.

The chief ceremonies are secular acts. The question is not whether religious ceremonies are necessary for valid adoptions or, in other words, whether the [illegible] is necessary. It is now settled that it is unnecessary if the adoptee boy belongs to the same gotra as the natural father. See also Bal Gangadhar Tilak v. Shri Shrinivas, 23 C. L. J. 1 P. C.; 1 L. R. 53 Bom. 481 P. C. The question whether it is necessary among the three twice-born classes, is still unsettled.

Performing the religious ceremony is necessary. 4 All. 219 (222).

Dattahomam itself can be performed at any time after the giving and receiving the boy. I. L. R. 2 Calc. 270; L. R. 7 I. A. 21. In I. L. R. 7 Mad. 528, the ceremony was performed 6 years after the giving and after the natural father's death. The case in 21 Mad. 487 (See p. 501) shows that the ceremony was performed after the adoptive father's death. It is not necessary that the natural father should himself participate in the ceremony. I. L. R. 16 Mad. 401 (1892); 3 M. L. J. 66. See also I. L. R. 32 Bom. 590 where the widow adopting delegated the duty of performing the religious ceremony to a relative.

The ceremony can be performed at any place. 3 Agra H. C. 105.